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Historical review of developments relating to aggression

Prepared by the Secretariat

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See PCNICC/2002/WGCA/L.1/Add.1

Introduction

The present paper was prepared in response to the request of the Working Group on the Crime of Aggression at the eighth session of the Preparatory Commission, held from 24 September to 5 October 2001.

The paper consists of four parts: part I. The Nuremberg Tribunal; part II. Tribunals established pursuant to Control Council Law No. 10; part III. The Tokyo Tribunal; and part IV. The United Nations. In addition, annex I contains tables 1 to 4 relating to aggression by a State and annex II contains tables 5 to 9 relating to individual responsibility for crimes against peace.

The purpose of the paper is to provide an objective, analytical overview of the history and major developments relating to aggression. It covers the developments prior to the adoption of the Charter of the United Nations and those subsequent to the adoption of the Charter. It includes the constituent instruments and the jurisprudence of the tribunals that considered the crimes against peace committed in Europe and the Far East during the Second World War, namely: the Charter and Judgement of the Nuremberg Tribunal, which was established to try the major war criminals of the European Axis; Control Council Law No. 10 and the judgements of the tribunals which conducted the subsequent trials of other war criminals in Germany; and the Charter and Judgement of the Tokyo Tribunal, which was established to try the major war criminals in the Far East.[1] The constituent instruments contain relatively brief definitions of crimes against peace. The jurisprudence of the tribunals clarifies and further addresses a number of important issues relating to two aspects of aggression: (a) the conduct by a State that constitutes aggression, and (b) the essential elements required for an individual to be held responsible for crimes against peace. The relevant information contained in the constituent instruments and the jurisprudence of the tribunals with respect to the various issues relating to the two aspects of aggression is also reflected in a series of tables contained in the annexes to the present paper.[2]

The paper also reviews the major developments resulting from the establishment of the United Nations after the Second World War, including the relevant provisions of the Charter which prohibit the threat or use of force and provide a role for some of its principal organs with respect to international peace and security. The paper reviews the practice of the Security Council and its resolutions condemning specific acts of aggression; the practice of the General Assembly and its resolutions condemning specific acts of aggression, some of which refer to the Definition of Aggression adopted by the Assembly; and the practice of the International Court of Justice and its jurisprudence concerning the function of the principal organs of the United Nations with respect to aggression, requests for interim measures to address alleged acts of aggression which threatened to interfere with pending cases involving other issues and cases involving claims of alleged acts of aggression.

The relevance of the constituent instruments and the jurisprudence of the tribunals established after the Second World War with respect to wars of aggression or wars in violation of international agreements, such as those providing for a declaration of war, could be questioned in the light of further developments culminating in the adoption of the Charter of the United Nations, which prohibited the use of force.[3] The instruments that provided for trials after the Second World War defined crimes against peace with reference to wars of aggression or wars in violation of international agreements. However, the tribunals that applied those instruments to determine the lawful or unlawful character of the wars first considered whether the wars were aggressive or defensive in character. They considered it unnecessary to decide whether the wars violated international agreements after finding that they constituted the even greater crime of aggressive war. Attention may also be drawn to the similarity between the type of conduct by a State which the tribunals found comprised aggressive war and the type of conduct by a State which the Security Council and the General Assembly have condemned as acts of aggression.

The paper seeks to be as comprehensive and yet as concise as possible. It is a factual description and to the extent possible reflects the terminology used by the decisions of the courts, tribunals, commissions and the resolutions of the Security Council and the General Assembly. The paper does not draw or suggest any conclusions with regard to the issues it covers, nor does it suggest whether the use of the word "aggression" with regard to a particular act by, for example, the Security Council or the General Assembly was or was not intended to be in the context of Article 39 of the Charter of the United Nations.

Notes

[1] The paper does not include the national legislation or the jurisprudence of national courts with respect to crimes against peace after the Second World War.

[2] The Rome Statute provides for the elaboration of a definition of the crime of aggression, but it does not specifically provide for the elaboration of the elements of this crime. Some of the more detailed aspects of the elements of individual criminal responsibility addressed in the jurisprudence of the tribunals may be considered more appropriate for the inclusion in the elements of the crime of aggression.

[3] The United Nations War Crimes Commission concluded that the irrelevance of a declaration of war was the main development of international law represented by the Charter of the Nuremberg and Tokyo tribunals as well as the judgement of the Nuremberg Tribunal; see paragraph 269 of the present paper.

I. The Nuremberg Tribunal

A. Establishment

1. The Nuremberg Tribunal was established for the purpose of trying the major criminals of the European Axis whose crimes had no particular geographical location. It was established by the United Kingdom of Great Britain and Northern Ireland, the United States of America, France and the Soviet Union by an agreement signed at London on 8 August 1945.[1] The Nuremberg Charter was annexed to the London Agreement and formed an integral part thereof. A number of other States subsequently adhered to the London Agreement.[2] In addition, the General Assembly of the United Nations unanimously affirmed the principles of international law recognized by the Charter and the Judgment of the Nuremberg Tribunal.[3]

B. Jurisdiction

2. The jurisdiction of the Nuremberg Tribunal was set forth in the Nuremberg Charter. The Nuremberg Tribunal was empowered, inter alia, to try and punish persons who, while acting in the interests of the European Axis countries, had committed crimes against peace, including: planning, preparing, initiating or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the above.[4]

C. The indictment

3. The Nuremberg Charter established the Committee for the Investigation and Prosecution of Major War Criminals, consisting of the Chief Prosecutors appointed by the four signatory States.[5] The Committee approved the indictment against the defendants designated as major war criminals.[6] The

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[1] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, United Nations, *Treaty Series*, vol. 82, p. 279 (hereinafter London Agreement); Charter of the International Military Tribunal, ibid., p. 284 (hereinafter Nuremberg Charter).

[2] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

[3] General Assembly resolution 95 (I). At the request of the General Assembly, the International Law Commission prepared the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Principle VI reflects the definition of crimes against peace contained in article 6 of the Nuremberg Charter reproduced below. Principle VI is reproduced in document PCNICC/2000/WGCA/INF/1, which was distributed to the Working Group on the Crime of Aggression at the fifth session of the Preparatory Commission, held from 12 to 30 June 2000.

[4] Article 6 of the Nuremberg Charter provided as follows:

> "Article 6. The Tribunal established by the Agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> "(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; ... "

[5] Nuremberg Charter, art. 14.

[6] Counts three and four contained the charges relating to war crimes and crimes against humanity, respectively. International Military Tribunal, Indictment No. 1, The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics – against – Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath and Hans Fritzsche, Individually and as Members of Any of the Following Groups or Organizations to which They Respectively Belonged, Namely: Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "SS") and including Die Sicherheitsdienst (commonly known as the "SD"); Die Geheimestaatspolizei (Secret State Police, commonly

indictment was submitted to the Nuremberg Tribunal on 18 October 1945.[7] Count one of the indictment addressed the common plan or conspiracy to commit, inter alia, crimes against peace. Count two contained the charges relating to crimes against peace.

1. The defendants

4. Counts one and two of the indictment contained charges against the following 24 defendants: Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath and Hans Fritzsche. Two of the defendants did not stand trial: Robert Ley committed suicide in prison on 25 October 1945; and Gustav Krupp von Bohlen und Halbach could not be tried because of his physical and mental condition, by decision of the Nuremberg Tribunal of 15 November 1945. Martin Bormann was tried in his absence, in accordance with article 12 of the Nuremberg Charter, by decision of the Nuremberg Tribunal of 17 November 1945. All of the defendants entered a plea of "not guilty", except for the defendant Bormann who was not present but was represented by counsel in accordance with article 16 of the Nuremberg Charter.[8]

2. Count one: The common plan or conspiracy to commit crimes against peace

5. Count one of the indictment addressed the nature and development of the common plan or conspiracy to commit, inter alia, crimes against peace. Count one began with a general discussion of the rise of the Nazi Party, its central role in the common plan or conspiracy, its aims and objectives, and the techniques and methods it used to advance the common plan or conspiracy, including the acquisition of totalitarian control of Germany and the economic planning and mobilization for aggressive war.[9]

6. Count one also addressed the defendants' utilization of Nazi control of the German Government for foreign aggression by pursuing their plan of rearming as well as reoccupying and fortifying the Rhineland in violation of the Treaty of Versailles as well as other treaties and thereby acquiring military strength and political bargaining power against other nations.

7. Count one identified the following acts in execution of the plan to abrogate the Treaty of Versailles and pave the way for subsequent major aggressive steps:

(a) Secretly rearming, including training military personnel, producing war munitions and building an air force;

(b) Leaving the International Disarmament Conference and the League of Nations;

(c) Promulgating legislation for universal military service with a peacetime strength of 500,000 men;

(d) Falsely announcing, with intent to deceive and allay fears of aggressive intentions, that they would respect the territorial limitations of the Treaty of Versailles and comply with the Locarno Pacts;

(e) Reoccupying and fortifying the Rhineland in violation of the above agreements and falsely announcing that they had no territorial demands to make in Europe.[10]

8. In addition, count one described the following aggressive acts committed against 12 countries between 1936 and 1941:

(a) The planning and execution of the invasion of Austria and Czechoslovakia (1936-1939);

(b) The preparation and initiation of the aggressive war against Poland (1939);

(c) The expansion of the war into a general aggressive war with the planning and execution of attacks on Denmark, Norway, Belgium, the

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known as the "Gestapo"); Die Sturmabteilungen der N.S.D.A.P. (commonly known as the "SA") and the General Staff and High Command of the German Armed Forces all as defined in appendix B. Trial of War Criminals, Documents, Dept. of State Publication 2420, United States Gov. Printing Office, 1945 (hereinafter Nuremberg Indictment).

[7] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, published at Nuremberg, Germany, 1947 (hereinafter Nuremberg Judgment), p. 171.

[8] The Nuremberg Tribunal rejected claims that the defendants Hess and Streicher were unable to stand trial due to their mental condition. Nuremberg Judgment, pp. 171-172.

[9] Nuremberg Indictment, pp. 25-31.

[10] Ibid., pp. 31-32.

Netherlands, Luxembourg, Yugoslavia and Greece (1939-1941);

(d) The invasion of the Soviet Union in violation of the non-aggression pact of 23 August 1939 (1941);

(e) The collaboration with Italy and Japan and the aggressive war against the United States (1936-1941).[11]

3. Count two: Planning, preparing, initiating and waging war as crimes against peace

9. Count two of the indictment contained the charges relating to crimes against peace. It alleged that all of the defendants had participated in planning, preparing, initiating and waging wars of aggression, which were also wars in violation of international treaties, agreements and assurances, initiated against the following 12 countries on the dates indicated:

- Poland (1939);
- United Kingdom and France (1939);
- Denmark and Norway (1940);
- Belgium, Netherlands and Luxembourg (1940);
- Yugoslavia and Greece (1941);
- Soviet Union (1941);
- United States (1941).[12]

10. Count two referred to the allegations that these were wars of aggression contained in count one. It also referred to the detailed statement of charges that planning, preparing and initiating these wars violated specific provisions of a number of international treaties, agreements and assurances set forth in appendix C to the indictment.[13]

4. The specific charges against the defendants

11. The indictment also contained specific charges against the defendants for crimes under counts one and two.[14] The defendants were charged with using their positions in the Nazi Party, the Government (including positions with respect to occupied territories), the military, the paramilitary, the economy (including banking and finance), industry or the media; their personal influence; and, in several instances, their relationship with the Führer to commit the various crimes listed below.

(a) Count one

12. The following defendants were charged with participating in the common plan or conspiracy to commit crimes against peace under count one:

(a) Göring, von Ribbentrop, Hess, Rosenberg, Frank, Bormann, Frick, Ley, Sauckel, Funk, Schacht, von Papen, von Neurath, von Schirach, Jodl, Krupp and Streicher: promoted the accession to power of the Nazi conspirators;

(b) Göring, Hess, Rosenberg, Frank, Bormann, Frick, Ley, Funk, Schacht, von Papen, von Schirach, Jodl, Krupp and Streicher: promoted or participated in the consolidation of the control of the Nazi conspirators over Germany;

(c) Fritzsche: disseminated and exploited the principal doctrines of the Nazi conspirators;

(d) Rosenberg: developed, disseminated and exploited the doctrinal techniques of the Nazi conspirators;

(e) von Schirach: promoted the militarization of Nazi-dominated organizations;

(f) von Ribbentrop, Bormann, Ley, Funk, Schacht, von Papen, von Neurath, Jodl, Raeder, Dönitz and Krupp: promoted the preparations for war;

(g) Keitel: promoted the military preparations for war;

(h) Göring: promoted the military and economic preparations for war;

(i) Hess: promoted the military, economic and psychological preparations for war;

(j) Rosenberg: promoted the psychological preparations for war;

(k) von Schirach: promoted the psychological and educational preparations for war;

(l) Hess: participated in preparing and planning the foreign policy plans of the Nazi conspirators;

(m) von Ribbentrop and von Neurath: executed and assumed responsibility for executing the foreign policy plans of the Nazi conspirators;

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[11] Ibid., pp. 32-36.

[12] Ibid., p. 37.

[13] Ibid., p. 38.

[14] Nuremberg Indictment, appendix A: Statement of Individual Responsibility for Crimes Set Out in Counts One, Two, Three and Four.

(n) Seyss-Inquart: promoted the seizure and the consolidation of control over Austria by the Nazi conspirators;

(o) Kaltenbrunner: promoted the consolidation of control over Austria seized by the Nazi conspirators.

(b) Counts one and two

13. The following defendants were charged with participating in the common plan or conspiracy to commit crimes against peace under count one and with planning, preparing, initiating or waging a war of aggression or a war in violation of international treaties, agreements or assurances under count two:

(a) Göring and Frick: participated in planning and preparing the Nazi conspirators for wars of aggression and wars in violation of international treaties, agreements and assurances;

(b) von Ribbentrop, Hess, Rosenberg, von Neurath, Seyss-Inquart, Keitel and Raeder: participated in the political planning and preparation of the Nazi conspirators for wars of aggression and wars in violation of international treaties, agreements and assurances;

(c) Jodl and Dönitz: participated in the military planning and preparation of the Nazi conspirators for wars of aggression and wars in violation of international treaties, agreements and assurances;

(d) Sauckel: participated in the economic preparations for wars of aggression and wars in violation of international treaties, agreements and assurances;

(e) Speer, Funk, Schacht, von Papen and Krupp: participated in the military and economic planning and preparation of the Nazi conspirators for wars of aggression and wars in violation of international treaties, agreements and assurances;

(f) Keitel and Raeder: executed and assumed responsibility for executing the plans of the Nazi conspirators for wars of aggression and wars in violation of international treaties, agreements and assurances.

(c) Count two

14. There was no separate charge against a defendant for crimes against peace under count two.

D. The judgement

1. The charges contained in counts one and two

15. The Nuremberg Tribunal noted that count one contained charges relating to conspiring or having a common plan to commit crimes against peace and count two contained charges relating to committing specific crimes against peace by planning, preparing, initiating and waging wars of aggression. The Tribunal decided to consider "the question of the existence of a common plan and the question of aggressive war together", before turning to the individual responsibility of the defendants.[15]

16. The Nuremberg Tribunal made the following observations concerning the charges relating to crimes against peace:

> "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.
>
> "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[16]

2. The factual background of the aggressive war

17. The Nuremberg Tribunal considered it necessary to begin by reviewing the factual background of the aggressive war. It traced the rise of the Nazi Party under Hitler's leadership to a position of supreme power, which paved the way for the alleged commission of all the crimes.[17] The Tribunal considered the origin and aims of the Nazi Party as well as its seizure and consolidation of power.[18]

18. The Nuremberg Tribunal noted that the Nazis sought to obtain power for the purpose of imposing a totalitarian regime that would enable them to pursue their aggressive polices.[19] The Nazis seized power by

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[15] Nuremberg Judgment, p. 186.

[16] Ibid.

[17] Ibid., pp. 174-182.

[18] Ibid.

[19] The Nuremberg Tribunal observed as follows:

> "... The NSDAP leaders did not make any serious attempt to hide the fact that their only

suspending guarantees of freedom and arresting political opponents to gain control of the legislature.[20] They consolidated their power by reducing the power of local and regional governments;[21] securing control of the civil service;[22] controlling the judiciary;[23] persecuting[24] and murdering their opponents,[25] including the Jews;[26] making the Nazi Party the only legal political party and making it a crime to maintain or form any other political party;[27] abolishing independent trade unions[28] and youth organizations;[29] limiting the influence of churches;[30] and increasing the Nazi's power over the German population by controlling education and the media.[31]

19. The programme of the Nazi Party, consisting of 25 points formulated as demands, was announced by Hitler at its first public meeting on 12 September 1919 and remained unchanged until the party was dissolved in 1945.[32] The following points were relevant to the

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purpose in entering German political life was in order to destroy the democratic structure of the Weimar Republic, and to substitute for it a National Socialist totalitarian regime which would enable them to carry out their avowed policies without opposition." Ibid., pp. 176-177.

[20] The Tribunal observed as follows:

> "... The Hitler Cabinet was anxious to pass an 'Enabling Act' that would give them full legislative powers, including the power to deviate from the Constitution. They were without the necessary majority in the Reichstag to be able to do this constitutionally. They therefore made use of the decree suspending the guarantees of freedom and took into so-called 'protective custody' a large number of Communist deputies and Party officials. Having done this, Hitler introduced the 'Enabling Act' into the Reichstag, and after he had made it clear that if it was not passed, further forceful measures would be taken, the act was passed on 24 March 1933." Ibid., p. 178.

[21] The Tribunal stated as follows:

> "In order to place the complete control of the machinery of government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich." Ibid., p. 178.

[22] The Tribunal stated as follows:

> "This was achieved by a process of centralization, and by a careful sifting of the whole Civil Service administration. By a law of 7 April [1933] it was provided that officials 'who were of non-Aryan decent' should be retired; and it also decreed that 'officials who because of their previous political activity do not offer security that they will exert themselves for the national State without reservation shall be discharged.'" Ibid., p. 178.

[23] The Tribunal stated as follows:

> "Similarly, the judiciary was subjected to control. Judges were removed from the bench for political or racial reasons ... Special courts were set up to try political crimes and only party members were appointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the judges were without power to intervene in any way. Pardons were granted to members of the Party who had been sentenced by the judges for proved offences ... In 1942 'judges' letters' were sent to all German judges by the Government, instructing them as to the 'general lines' that they must follow." Ibid., p. 179.

[24] The Tribunal stated as follows:

> "Other political parties were persecuted, their property and assets confiscated, and many of their members placed in concentration camps." Ibid., p. 178.

[25] The Tribunal stated as follows:

> "In any consideration of the crushing of opposition, the massacre of 30 June 1934 must not be forgotten. It has become known as the 'Röhm Purge' or 'the blood bath', and revealed the methods which Hitler and his immediate associates ... were ready to employ to strike down all opposition and consolidate their power. On that day Röhm, the Chief of Staff of the SA since 1931, was murdered by Hitler's orders, and the 'Old Guard' of the SA was massacred without trial and without warning. The opportunity was taken to murder a large number of people who at one time or another had opposed Hitler." Ibid., p. 181.

[26] The Tribunal stated as follows:

> "In September 1935, the so-called Nuremberg Laws were passed, the most important effect of which was to deprive Jews of German citizenship. In this way the influence of Jewish elements on the affairs of Germany was extinguished, and one more potential source of opposition to Nazi policy was rendered powerless." Ibid., p. 181.

[27] Ibid., p. 178.

[28] Ibid., p. 179.

[29] Ibid., p. 181.

[30] Ibid., p. 180.

[31] Ibid., p. 181.

[32] The German Labour Party, which was formed on 5 January 1919, later changed its name to the National

charges relating to crimes against peace: the unification of all Germans in Greater Germany; the abrogation of the peace treaties of Versailles and Saint-Germain-en-Laye; the acquisition of land and territory for the sustenance of the German people and the colonization of its surplus population; and the abolition of the mercenary troops and the formation of a national army.[33]

20. The Nuremberg Tribunal considered a typical speech given by Hitler in 1923 in which he emphasized the three demands that were at the foundation of the Nazi movement: the unification of all Germans; setting aside the Peace Treaty of Versailles; and land and soil to feed Germany. The Tribunal noted the important role that these demands played in formulating the aggressive policies and guiding the aggressive actions of the Nazi regime, as follows:

> "The demand for the unification of all Germans in Greater Germany was to play a large part in the events preceding the seizure of Austria and Czechoslovakia; the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government; the demand for land was to be the justification for the acquisition of 'living space' at the expense of other nations ... and the demand for a national army was to result in measures of rearmament on the largest possible scale, and ultimately in war."[34]

21. The Nuremberg Tribunal noted the willingness of the Nazi Party to achieve these goals by force unless their demands were conceded to in negotiations:

> "There were only two ways in which Germany could achieve the three main aims above-mentioned, by negotiation, or by force. The 25 points of the NSDAP [Nazi Party] programme do not specifically mention the methods on which the leaders of the Party proposed to rely, but the history of the Nazi regime shows that Hitler and his followers were only prepared to negotiate on the terms that their demands were conceded to, and that force would be used if they were not."[35]

3. Measures of rearmament

22. In reviewing the measures of rearmament in preparation for aggression, the Nuremberg Tribunal noted the reorganization of the economy for military purposes (particularly the armament industry), the withdrawal from the International Disarmament Conference and the League of Nations, the steps taken to abrogate the Treaty of Versailles (including the disarmament clauses), the adoption of legislation instituting compulsory military service and setting the peacetime strength of the German army at 500,000 men, the rebuilding of the armed forces (including building a military air force contrary to the Treaty of Versailles as well as rebuilding the German Navy and constructing a new submarine division contrary to the Treaty of Versailles and the Anglo-German Treaty of 1937), the false assurances of the intention to respect the territorial limitations of the Treaty of Versailles and comply with the Locarno Pacts, and the re-entry into the demilitarized zone of the Rhineland by German troops contrary to the Treaty of Versailles.[36]

23. The Nuremberg Tribunal indicated that the rearmament of Germany in violation of its treaty commitments was important because it was undertaken with the motive of achieving military superiority or at least a more favourable position with respect to ships designed for warfare on the high seas before the war envisaged with the United Kingdom.[37]

4. Preparing and planning for aggression

24. Before considering the alleged acts of aggression and aggressive war, the Nuremberg Tribunal reviewed the events that preceded the aggression, which showed that they were premeditated, deliberate, planned, carefully prepared and timed as part of a preordained plan and as a deliberate and essential part of Nazi foreign policy:

> "The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was

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Sozialistische Deutsche Arbeiter Partei — NSDAP or Nazi Party. Ibid., pp. 174-175.

[33] Ibid., pp. 174-175.

[34] Ibid., p. 175.

[35] Ibid., pp. 175-176.

[36] Ibid., pp. 182-186.

[37] The defendant Raeder wrote as follows: "The Führer hoped until the last moment to be able to put off the threatening conflict with England until 1944-1945. At that time, the Navy would have had available a fleet with a powerful U-boat superiority, and a much more favourable ratio as regards strength in all other types of ships, particularly those designed for warfare on the high seas." Ibid., p. 185.

> premeditated and carefully planned, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy."[38]

25. In terms of preparing Germany for aggression, the Nuremberg Tribunal attributed particular importance to the book Hitler wrote entitled *Mein Kampf*, which contained his political views and aims and later became the authentic source of Nazi doctrine. In the book, Hitler repeatedly expressed "his belief in the necessity of force as the means of solving international problems", proclaimed "the extolling of force as an instrument of foreign policy" and set forth the precise objectives of this policy of force, including territorial expansion. The Nuremberg Tribunal considered the book to be important because it revealed Hitler's "unmistakable attitude of aggression". The Tribunal noted that the book was widely distributed throughout Germany, with over 6.5 million copies having been circulated by 1945.[39]

26. In addressing the planning of aggression, the Nuremberg Tribunal attributed particular importance to four secret, high-level meetings held on 5 November 1937 and 23 May, 22 August and 23 November 1939 at which Hitler outlined his aggressive plans for the future and reviewed the progress achieved in the implementation of his aggressive policies as of that time. The Tribunal took into account whether the defendants had attended any of these meetings when subsequently determining their individual criminal responsibility.[40]

5. Acts of aggression and aggressive wars

27. The Nuremberg Tribunal then turned to the charges of acts of aggression against Austria and Czechoslovakia and acts of aggressive war against Poland; Denmark and Norway; Belgium, the Netherlands and Luxembourg; Yugoslavia and Greece; the Soviet Union; and the United States.[41]

(a) The seizure of Austria

28. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggression by the seizure of Austria, including:

(a) The cooperation between the German Nazis and the Austrian Nazis with the object of incorporating Austria into the German Reich;

(b) The Nazis' unsuccessful attempt to seize Austria in 1934, which resulted in the assassination of Chancellor Dollfuss and the outlawing of the Nazi Party in Austria;

(c) Hitler's announcement that Germany did not intend to attack Austria or to interfere in its internal affairs in 1935, his public avowal of peaceful intentions towards Austria and Czechoslovakia in 1936, and his recognition of the full sovereignty of Austria by treaty in 1936;

(d) The 1936 treaty with Austria, in which Germany recognized the full sovereignty of Austria and agreed not to directly or indirectly influence its internal affairs;

(e) The German Nazis' continuing active support for the illegal activities of the Austrian Nazis, which led to "incidents" used by Germany as an excuse to interfere in Austrian affairs;

(f) The conference between Hitler and Chancellor Schuschnigg in February 1938, at which the latter was forced by threat of immediate invasion to grant a series of concessions aimed at strengthening the Nazis in Austria;

(g) The ultimatum that Hitler sent to Schuschnigg in March 1938 demanding that the plebiscite on the question of Austrian independence be cancelled;

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[38] Idem.

[39] Nuremberg Judgment, pp. 176, 187-188. The Tribunal observed as follows: "*Mein Kampf* is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification. Its importance lies in the unmistakable attitude of aggression revealed throughout its pages." Ibid., p. 188.

[40] Ibid., pp. 188-192.

[41] The Tribunal did not consider the charge of aggressive war against the United Kingdom and France in this part of its judgment, dealing primarily with count one. Under count two, the defendants were charged with planning and waging aggressive war against 12 nations, including the United Kingdom and France. The Tribunal later "decided that certain of the defendants had planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes." Ibid., p. 216.

(h) The series of demands upon the Austrian Government made by the defendant Göring under threat of invasion in March 1938;

(i) The resignation of Schuschnigg and the appointment of the defendant Seyss-Inquart as Chancellor in response to German demands;

(j) Hitler's order for German troops to cross the Austrian border and his instructions to Seyss-Inquart to use the Austrian Nazis to depose President Miklas and to seize control of the Austrian Government;

(k) The telegram from Seyss-Inquart to Hitler requesting Germany to send troops to establish peace and order in Austria after the resignation of the Schuschnigg Government, which was dictated by Göring after Hitler ordered the invasion and quoted in the press to justify the military action although it was never sent;

(l) The entry of German troops into Austria without resistance on 12 March 1938;

(m) The resignation of President Miklas after refusing to sign the law passed for the reunion of Austria in the German Reich and the signing of this law by his successor, the defendant Seyss-Inquart;

(n) The adoption of the reunion law as a law of the Reich, which was signed by Hitler and the defendants Göring, Frick, von Ribbentrop and Hess.[42]

29. The Tribunal had previously considered Hitler's statement at the 5 November 1937 meeting indicating his "plain intention to seize Austria and Czechoslovakia":

> "For the improvement of our military-political position, it must be our first aim in every case of entanglement by war to conquer Czechoslovakia and Austria simultaneously, in order to remove any threat from the flanks in case of a possible advance westwards.
>
> "...
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> "The annexation of the two States to Germany militarily and politically would constitute a considerable relief, owing to shorter and better frontiers, the freeing of fighting personnel for other purposes, and the possibility of reconstituting new armies up to a strength of about 12 divisions."[43]

30. The Tribunal rejected the defence attempt to justify the annexation of Austria as inconsistent with the aggressive motive of and the methods used by Germany:

> "It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was achieved without bloodshed.
>
> "These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were plainly those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. Moreover, none of these considerations appear from the Hossbach account of the meetings of 5 November 1937 to have been the motives which actuated Hitler; on the contrary, all the emphasis is there laid on the advantage to be gained by Germany in her military strength by the annexation of Austria."[44]

31. The Nuremberg Tribunal concluded that "the invasion of Austria was a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries". The Tribunal noted that, as a result of the invasion of Austria, Germany's flank was protected while Czechoslovakia's was greatly weakened, many new divisions of trained fighting men were acquired, the seizure of foreign exchange reserves greatly strengthened the rearmament programme, and the first step was taken in the seizure of "Lebensraum" (living space).[45]

(b) The seizure of Czechoslovakia

32. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggression by the seizure of Czechoslovakia, including:

(a) The high-level conference of 5 November 1937, clearly indicating the definite decision to seize Czechoslovakia;

(b) Göring's false assurances to the Czechoslovak Minister M. Mastny in Berlin on 11 March 1938 that the developments in Austria would not have a detrimental influence on German-Czech relations and that Germany earnestly endeavoured to improve those relations, which were designed "to keep Czechoslovakia quiet while Austria was absorbed";

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[42] Ibid., pp. 192-194.

[43] Ibid., p. 191.

[44] Ibid., p. 194.

[45] Ibid., p. 192.

(c) Von Neurath's false assurances on behalf of Hitler to the same Minister on 12 March 1938 that Germany considered itself bound by the 1925 German-Czechoslovak Arbitration Convention concluded at Locarno;

(d) Hitler's order of 28 May 1938 to prepare for military action against Czechoslovakia, the subsequent constant review of the plan to invade Czechoslovakia and Hitler's directive of 30 May 1938 declaring "his unalterable decision to smash Czechoslovakia by military action in the near future";

(e) The elaborate plan proposed in June 1938 to send the SD (Sicherheitsdienst — intelligence agency) and the Gestapo (Geheimstaatspolizei — secret police)[46] to Czechoslovakia in conjunction with the German troops as well as to divide and incorporate Czechoslovakia into the German Reich;[47]

(f) The memorandum of August 1938 prepared by the defendant Jodl and approved by Hitler concerning the timing of the invasion of Czechoslovakia and the "incident" to be used as provocation for German military intervention;

(g) The detailed planning of the occupation of Czechoslovakia preceding the Munich Conference held in September 1938 at which Hitler, Mussolini and the British and French Prime Ministers signed the Munich Pact on 29 September requiring Czechoslovakia to cede the Sudetenland to Germany;

(h) Hitler's signing the Munich Pact with no intention of complying with it and his false assurance that Germany would have no more territorial problems in Europe;

(i) Hitler's meeting with Czech President Hacha at which the latter signed an agreement on 14 March 1939 consenting to the immediate incorporation of the Czech people into the German Reich to save Bohemia and Moravia from destruction, after being informed that German troops had been ordered to march and any resistance would be met with physical force, and to avoid Göring's threatened complete destruction of Prague by air;

(j) The occupation by German troops of Bohemia and Moravia on 15 March 1939;

(k) The German decree issued on 16 March 1939 incorporating Bohemia and Moravia into the Reich as a protectorate.[48]

33. The Nuremberg Tribunal had previously concluded that Germany's actions with respect to Austria, Czechoslovakia and Poland were undoubtedly aggressive in character based on Hitler's address at a meeting held on 23 November 1939 in which he reviewed those events and reaffirmed his aggressive intentions with respect to those countries.[49] He stated:

> "One year later, Austria came; this step also was considered doubtful. It brought about a considerable reinforcement of the Reich. The next step was Bohemia, Moravia and Poland. This step also was not possible to accomplish in one campaign. First of all, the western fortification had to be finished. It was not possible to reach the goal in one effort. It was clear to me from the first moment that I could not be satisfied with the Sudeten German territory. That was only a partial solution. The decision to march into Bohemia was made. Then followed the erection of the Protectorate and with that the basis for the action against Poland was laid, but I wasn't quite clear at that time whether I should start first against the East and then in the West or vice versa ... Basically I did not organize the Armed Forces in order not to strike. The decision was always in me. Earlier or later I wanted to solve the problem. Under pressure it was decided that the East was to be attacked first."[50]

(c) The invasion of Poland

34. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed

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[46] Ibid., pp. 178, 262.

[47] While noting that this plan was later modified in some respects after the Munich Conference, the Nuremberg Tribunal found that "the fact the plan existed in such exact detail and was couched in such warlike language indicated a calculated design to resort to force." Ibid., p. 196.

[48] Ibid., p. 196.

[49] "This address, reviewing past events and reaffirming the aggressive intentions present from the beginning puts beyond any question of doubt the character of the actions against Austria and Czechoslovakia, and the war against Poland." Ibid., p. 189.

[50] Ibid.

an act of aggressive war by the invasion of Poland, including:

(a) The Arbitration Treaty between Germany and Poland providing for the settlement of all disputes adopted at Locarno in 1925;

(b) The German-Polish declaration of non-aggression of 1934;

(c) Hilter's speeches in the Reichstag concerning Germany's peaceful relations with Poland in 1934, 1937 and 1938;

(d) Hitler's speech assuring that Germany would have no more territorial problems in Europe after the Czechoslovakian problem was solved in September 1938;

(e) Hitler's order for the German Armed Forces to prepare for German troops to occupy Danzig (Gdansk) by surprise, contained in the directive issued in November 1938;

(f) Hitler's speech in the Reichstag concerning friendly relations between Germany and Poland, January 1939;

(g) Hitler's further directions to the Armed Forces to prepare for the invasion of Poland at any time from 1 September 1939, including drawing up a precise timetable and synchronizing timings between the branches of the Armed Forces, issued as a directive on 3 April 1939;

(h) Hitler's aim of destroying Polish military strength and satisfying defence requirements in the East as well as his plan to incorporate Danzig into Germany, set forth in the directive to the Armed Forces issued on 11 April 1939;

(i) Hitler's speech in the Reichstag denying his intention to attack Poland, given on 28 April 1939;

(j) Hitler's decision to attack Poland at the first suitable opportunity to enlarge the living space and secure food supplies for Germany, which he announced at the military conference held on 23 May 1939;

(k) Other subsequent meetings and directives concerning preparations for the war;

(l) Hilter's decision as to the date for starting the war with Poland, announced at the meeting held on 22 August 1939;[51]

(m) The unsuccessful appeals to Hitler to avoid war with Poland made by the United Kingdom, the United States, the Holy See and France from 22 to 31 August 1939;

(n) The negotiations to settle the dispute with Poland which were not entered into by Germany in good faith or to maintain peace but solely to prevent the United Kingdom and France from assisting Poland, from 29 to 30 August 1939;

(o) Hitler's final directive to attack Poland on 1 September 1939 and to take action if the United Kingdom and France entered the war to defend Poland, issued on 31 August 1939;

(p) The invasion of Poland on 1 September 1939.[52]

35. The Nuremberg Tribunal thus concluded that Germany had initiated aggressive war against Poland:

> "In the opinion of the Tribunal, the events of the days immediately preceding 1 September 1939 demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1 September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world."[53]

(d) The invasion of Denmark and Norway

36. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggressive war by the invasion of Denmark and Norway, including:

(a) The Treaty of Non-Aggression between Germany and Denmark of 31 May 1939;

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[51] Hitler indicated that the order to begin the war would probably be given on 26 August 1939. It was postponed for a few days to attempt to persuade the United Kingdom not to intervene after it had signed a mutual assistance pact with Poland on 25 August 1939 and Mussolini indicated his unwillingness to enter the war on Germany's side. Ibid., p. 203.

[52] Ibid., pp. 198-204.

[53] Ibid., p. 204.

(b) Germany's solemn assurance not to prejudice Norway's inviolability and integrity and to respect its territory as long as Norway maintained its neutrality, given on 2 September 1939 after the war with Poland had begun;

(c) The memoranda, report, correspondence and meetings concerning the planning and preparations for the invasion of Norway to obtain bases to improve Germany's strategic and operational position, from October 1939 to January 1940;

(d) The further assurances given by Germany to Norway of no conflicts of interest or points of controversy with the Northern States in October 1939;

(e) Hitler's promise to provide financial support to the Norwegian traitor Quisling for his planned coup d'état in Norway and to examine the military questions involved, December 1939;

(f) Hitler's directive to prepare for the occupation of Denmark and Norway to prevent British encroachment on Scandinavia and the Baltic, to guarantee the ore base in Sweden and to give the German Navy and Air Force a wider start line against the United Kingdom, issued on 1 March 1940;

(g) The naval operation orders for the invasion of Denmark and Norway issued on 24 March 1940 as well as the operational order issued to the U-boats on 30 March 1940;

(h) The invasion of Denmark and Norway on 9 April 1940.[54]

37. The Tribunal considered the defence claim that the invasion of Norway was an act of self-defence to prevent an Allied occupation:

> "From this narrative it is clear that as early as October 1939 the question of invading Norway was under consideration. The defence that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive."[55]

38. The Tribunal rejected the defence argument that Germany's judgement as to whether preventive action was necessary was conclusive:

> "It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her judgement was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[56]

39. The Tribunal, based on the *Caroline* case,[57] further rejected the self-defence claim after finding that the German invasion was not undertaken to prevent an imminent Allied landing:

> "It must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation' ...
>
> "...
>
> "From all this it is clear that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing but, at the most, that they might prevent an Allied occupation at some future date."[58]

40. The Tribunal found that the motive for the occupation of Norway was acquiring bases for a more effective attack on the United Kingdom and France:

> "Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans, which are now relied on to support the argument of self-defence."[59]

41. It noted that no justification had been offered for the invasion of Denmark:

> "No suggestion is made by the defendants that there was any plan by any belligerent, other than Germany, to occupy Denmark. No excuse for that aggression has ever been offered."[60]

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[54] Ibid., pp. 204-209.

[55] Ibid., p. 207.

[56] Ibid., p. 208.

[57] *Moore's Digest of International Law*, vol. II, p. 412.

[58] Nuremberg Judgment, p. 207.

[59] Ibid., p. 208.

[60] Ibid.

42. It also noted that Germany had been considering occupying Denmark and Norway with the aim of their becoming German possessions:

> "Nevertheless, on 3 June 1940, a German naval memorandum discussed the use to be made of Norway and Denmark, and put forward one solution for consideration, that the territories of Denmark and Norway acquired during the course of the war should continue to be occupied and organized so that they could in the future be considered as German possessions."[61]

43. The Tribunal thus concluded that the invasions of Denmark and Norway were acts of aggressive war:

> "In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war."[62]

(e) The invasion of Belgium, the Netherlands and Luxembourg

44. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggressive war by the invasion of Belgium, the Netherlands and Luxembourg, including:

(a) The plan to seize Belgium and the Netherlands to obtain airbases in the war against the United Kingdom and France, as of August 1938;

(b) Hitler's statement to his military commanders that Netherlands and Belgian airbases must be occupied and their neutrality ignored, in May 1939;

(c) Hitler's false assurances to respect the neutrality of Belgium, the Netherlands and Luxembourg in August and October 1939;

(d) The directive to the Army to prepare for the immediate invasion of Netherlands and Belgian territory, in October 1939;

(e) The series of orders scheduling the attack for 10 November 1939, which was postponed until May 1940 because of weather and transport problems;

(f) Hitler's discussion of his plan to occupy Belgium and the Netherlands to be able to mine the British coast and to ignore their neutrality at the meeting held on 23 November 1939;

(g) The invasion of Belgium, the Netherlands and Luxembourg on 10 May 1940.[63]

45. The Tribunal considered the memoranda that Germany transmitted to the Governments of the occupied countries attempting to justify the invasion on the grounds that the British and French armies were planning to march through them to attack the Ruhr. The Tribunal concluded that the invasions were unjustified acts of aggressive war:

> "There is no evidence before the Tribunal to justify the contention that the Netherlands, Belgium and Luxembourg were invaded by Germany because their occupation had been planned by England and France. British and French staffs had been cooperating in making certain plans for military operations in the Low Countries, but the purpose of this planning was to defend these countries in the event of a German attack.
>
> "The invasion of Belgium, Holland and Luxembourg was entirely without justification.
>
> "It was carried out in pursuance of policies long considered and prepared, and was plainly an act of aggressive war. The resolve to invade was made without any other consideration than the advancement of the aggressive policies of Germany."[64]

(f) The invasion of Yugoslavia and Greece

46. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggressive war by the invasion of Yugoslavia and Greece, including:

(a) Hilter's assurances that Germany regarded Yugoslavia's frontier as final and inviolable, in June and October 1939;

(b) Hitler and von Ribbentrop's unsuccessful attempt to persuade Italy to enter the war on Germany's side by attacking Yugoslavia, in August 1939;

(c) The Italian invasion of Greece on 28 October 1940;

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[61] Ibid., pp. 208-209.

[62] Ibid., p. 209.

[63] Ibid., pp. 209-210.

[64] Ibid., p. 210.

(d) Hitler's directive for the prosecution of the war instructing the Commander-in-Chief of the Army to prepare to occupy the Greek mainland, issued in November 1940;

(e) Hitler's directive concerning the invasion of Greece, indicating his plan to occupy the entire Greek mainland if necessary, issued in December 1940;

(f) Hitler's meeting with Mussolini at which he indicated that the massing of troops in Romania was partly for the purpose of an operation against Greece, in January 1941;

(g) The directive indicating Hitler's decision that the operation against Greece would be carried out in February-March 1941, issued in February 1941;

(h) The landing of British troops in Greece to help them resist the Italians, on 3 March 1941;

(i) Hitler's confirmation that the complete occupation of Greece was a prerequisite to any settlement, at a meeting on 18 March 1941;

(j) Yugoslavia's adherence to the Tripartite Pact on 25 March 1941 as well as the subsequent coup d'état in Yugoslavia and the repudiation of the pact by the new Government on 26 March 1941;

(k) Hitler's concern that Yugoslavia was an uncertain factor in the future attacks against Greece and Russia and his decision to prepare to destroy Yugoslavia militarily and as a national unit with "unmerciful harshness", announced at the conference with the German High Command on 27 March 1941;

(l) The invasion of Yugoslavia and Greece without warning as well as the bombing of Belgrade on 6 April 1941.[65]

47. The Tribunal noted that the invasion had been carried out so quickly that Germany did not have time to prepare any "incidents" or justifications for this action:

> "So swift was this particular invasion that there had not been time to establish any 'incidents' as a usual preliminary, or to find and publish any adequate 'political' explanations. As the attack was starting on 6 April, Hitler proclaimed to the German people that this attack was necessary because the British forces in Greece (who were helping the Greeks to defend themselves against the Italians) represented a British attempt to extend the war to the Balkans."[66]

48. The Tribunal concluded that the wars against Greece and Yugoslavia were clearly aggressive:

> "It is clear from this narrative that aggressive war against Greece and Yugoslavia had long been in contemplation, certainly as early as August of 1939. The fact that Great Britain had come to the assistance of the Greeks, and might thereafter be in a position to inflict great damage upon German interests, was made the occasion for the occupation of both countries."[67]

(g) The invasion of the Soviet Union

49. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggressive war by the invasion of the Soviet Union, including:

(a) The non-aggression pact signed by Germany and the Soviet Union in 1939;

(b) The Soviet Union's compliance with the non-aggression pact;

(c) Germany's preparations for an attack on the Soviet Union in spite of the non-aggression pact, as of late summer 1940;

(d) Surveys of the economic possibilities of the USSR, including its raw materials, its power and transport system, and its capacity to produce arms;

(e) The creation of many military-economic units to achieve the most complete and efficient economic exploitation of the occupied territories in the interest of Germany;

(f) The plan for the attack on the Soviet Union, which was completed in November 1940;

(g) The plans for the destruction of the Soviet Union as an independent State, its partition and the creation of Reich Commissariats and German colonies;

(h) Hitler's directive to complete all preparations for the attack on the Soviet Union by May 1941, issued in December 1940;

(i) Drawing Hungary, Romania and Finland into the war against the Soviet Union;

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[65] Ibid., pp. 210-213.

[66] Ibid., pp. 212-213.

[67] Ibid., p. 213.

(j) The invasion of the Soviet Union, without declaration of war, as planned on 22 June 1941.[68]

50. The Tribunal considered the design and purpose of Germany's action against the Soviet Union:

> "The evidence which has been given before this Tribunal proves that Germany had the design carefully thought out, to crush the USSR as a political and military power, so that Germany might expand to the east according to her own desire ... But there was a more immediate purpose, and in one of the memoranda of the OKW,[69] that immediate purpose was stated to be to feed the German Armies from Soviet territory in the third year of the war, even if 'as a result many millions of people will be starved to death if we take out of the country the things necessary for us.'"[70]

51. The Tribunal rejected the defence argument that Germany's attack on the Soviet Union was a justified act of self-defence and concluded that the war against the Soviet Union was plain aggression:

> "It was contended for the defendants that the attack upon the USSR was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end. It is impossible to believe that this view was ever honestly entertained.
>
> "The plans for the economic exploitation of the USSR, for the removal of masses of the population, for the murder of Commissars and political leaders, were all part of the carefully prepared scheme launched on 22 June without warning of any kind, and without the shadow of legal excuse. It was plain aggression."[71]

(h) The declaration of war against the United States

52. The Nuremberg Tribunal considered a number of factors in determining whether Germany had committed an act of aggressive war by declaring war against the United States, including:

(a) Germany's promise to support Japan against the United States notwithstanding the initial German policy of keeping the United States out of the war, in April 1941;

(b) Germany's encouraging Japan to attack the United Kingdom and the United States and assuring that Germany would join the war against the United States immediately, in November 1941;

(c) Germany's agreement to provide support after Japan indicated that it was preparing to attack the United States and requested support, in November-December 1941;

(d) The German declaration of war on the United States shortly after Japan attacked Pearl Harbor on 7 December 1941.[72]

53. The Tribunal concluded that Germany had entered an aggressive war against the United States:

> "Although it is true that Hitler and his colleagues originally did not consider that a war with the United States would be beneficial to their interest, it is apparent that in the course of 1941 that view was revised, and Japan was given every encouragement to adopt a policy which would almost certainly bring the United States into the war. And when Japan attacked the United States fleet in Pearl Harbor and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States."[73]

6. Wars in violation of international treaties, agreements or assurances

54. The Nuremberg Tribunal noted that the Nuremberg Charter defined crimes against peace as including wars of aggression or wars in violation of international treaties, agreements or assurances. Since it had already determined that aggressive war had been planned and waged against 12 countries, the Tribunal considered it unnecessary to consider in detail whether the wars also violated international treaties, agreements or assurances. Referring to the treaties set out in appendix C of the indictment, the Tribunal attributed principal importance to the Hague Conventions; the

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[68] Ibid., pp. 213-215.

[69] The OKW (Oberkommando der Wehrmacht) was the "High Command of the German Armed Forces with Hitler as the Supreme Commander". Ibid., p. 277.

[70] Ibid., p. 214.

[71] Ibid., p. 215. Although the Nuremberg Tribunal did not use the term "aggressive war" in its conclusion, this part of its judgement was entitled "The Aggressive War against the Union of Soviet Socialist Republics". Ibid., p. 213.

[72] Ibid., pp. 215-216.

[73] Ibid., p. 216.

Treaty of Versailles; the treaties of mutual guarantees, arbitration and non-aggression; and the Kellogg-Briand Pact. It also made a specific finding that Germany had violated a number of provisions of the Treaty of Versailles and that all of the aggressive wars violated the Kellogg-Briand Pact.[74]

7. The Law of the Charter

55. The Nuremberg Tribunal described the Nuremberg Charter as an expression of existing international law rather than an arbitrary exercise of power by the victorious nations.[75] The Tribunal considered the law of the Charter to be decisive and binding upon it.

The crime of aggressive war

56. In response to arguments made by the prosecution and the defence, the Nuremberg Tribunal considered whether aggressive war had been a crime before the adoption of the Nuremberg Charter. The Tribunal concluded that war as an instrument of national policy was already a crime based on the General Treaty for the Renunciation of War of 1928 (the Kellogg-Briand Pact):

> "... the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact."[76]

57. The Nuremberg Tribunal considered the following earlier solemn expressions of opinion in support of this interpretation:

(a) Article I of the 1923 draft Treaty of Mutual Assistance sponsored by the League of Nations, which declared that "aggressive war is an international crime";

(b) The preamble to the 1924 League of Nations Protocol for the Pacific Settlement of International Disputes (unanimously recommended to members by the League of Nations Assembly but never ratified), which declared that "a war of aggression ... is an international crime";

(c) The preamble to the 1927 declaration unanimously adopted by the League of Nations Assembly stating that "a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime";

(d) The resolution adopted unanimously by 21 nations at the Pan-American Conference in 1928, declaring that "war of aggression constitutes an international crime against the human species".[77]

8. The common plan or conspiracy

58. The Nuremberg Tribunal noted that the Nuremberg Charter distinguished between planning, preparing, initiating or waging aggressive war, on the one hand, and participating in a common plan or conspiracy to accomplish any of the above, on the other. The Tribunal also noted that the indictment followed this distinction by including the charges relating to the common plan or conspiracy in count one and those relating to planning and waging aggressive war in count two. It considered counts one and two together since the same evidence had been offered to support them and they were in substance the same. However, it indicated that since the defendants had been charged under both counts, their guilt must subsequently be determined under each of them.[78]

59. The Tribunal reviewed the charges of a common plan or conspiracy to commit crimes against peace contained in the indictment, which highlighted the role of the Nazi Party:

> "The 'Common Plan or Conspiracy' charged in the Indictment covered 25 years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. The Party is spoken of as 'the instrument of cohesion among the Defendants' for carrying out the purposes of the conspiracy — the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and 'Lebensraum' in Europe, by the use, if necessary, of armed force, of aggressive war. The 'seizure of power' by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of Jews, the regimentation of youth — all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany

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[74] Ibid., pp. 216-218.

[75] Ibid., p. 218.

[76] Ibid., p. 220.

[77] Ibid., pp. 221-222.

[78] Ibid., p. 224.

> from the Disarmament Conference and the League of Nations, universal military service and seizure of the Rhineland. Finally, according to the Indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936-1938, followed by the planning and waging of war against Poland; and successively against 10 other countries".[79]

60. The Tribunal noted the prosecution's argument that significant participation in the Nazi Party or Government indicated participation in the criminal conspiracy. It considered the requirements for a criminal conspiracy (a criminal purpose that is clearly outlined and not too far removed from the time of decision and action) and criminal planning (participation in a concrete plan to wage war). The Tribunal observed:

> "The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kempf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."[80]

61. The Tribunal observed that "planning and preparation are essential to the making of war". It found that systematic planning and preparation for aggressive war had been carried out in Germany.[81] The Tribunal concluded that it was sufficient to find a number of separate plans rather than a single master conspiracy:

> "It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are examined. That plans were made to wage war, as early as 5 November 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries. Indeed the threat of war — and war itself if necessary — was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. That Germany was rapidly moving to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this Judgment.
>
> "In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning with aggressive war as the objective has been established beyond doubt".[82]

62. The Tribunal rejected the argument that Hitler's complete dictatorship precluded this common planning:

> "The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does

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[79] Ibid., pp. 224-225.

[80] Ibid., p. 225.

[81] In the previous recital of facts relating to aggressive war, it is clear that planning and preparation had been carried out in the most systematic way at every stage of the history. Ibid., p. 224.

[82] Ibid., p. 225.

in the comparable tyranny of organized domestic crime."[83]

9. Individual criminal responsibility

63. The Nuremberg Tribunal then turned to the question of the individual criminal responsibility of the 22 defendants for the specific crimes with which they were charged under counts one or two: 8 defendants were convicted of counts one and two; 4 defendants were acquitted of count one and convicted of count two; 4 defendants were acquitted of counts one and two; and 6 defendants were acquitted of count one and not charged with count two.

(a) Defendants convicted of counts one and two

(i) Göring

64. The Nuremberg Tribunal convicted the defendant Göring of counts one and two after considering his relationship with Hitler; his high-level positions in the Nazi Party, the Government and the military; his role in the rise of the Nazi Party; his knowledge of the aggressive plans; his leading role in the rearmament in preparation for aggression; and his participation in the acts of aggression and aggressive war, as follows:

(a) He was the adviser and active agent of Hitler;

(b) He was a prime leader of the Nazi movement, as Hitler's political deputy he was instrumental in bringing the Nazis to power in 1933 and he was charged with consolidating this power;

(c) He held high-level government and military positions in the Nazi regime;

(d) He developed the Gestapo and created the first concentration camps;

(e) In 1936, he became Plenipotentiary for the Four Year Plan and thus "the economic dictator of the Reich";

(f) He played a leading role in the rearmament of Germany, particularly expanding the Luftwaffe (air force) and emphasizing offensive weapons;

(g) He attended a number of high-level meetings concerning the planning and preparation for aggression;

(h) He was the central figure ("ringleader") in the Austrian Anschluss (annexation);

(i) He gave false assurances to Czechoslovakia, he planned the air offensive (which proved unnecessary) and he attended the meeting with Hitler and President Hacha and threatened to bomb Prague if Hacha did not concede;

(j) He engaged in diplomatic manoeuvres to prevent the British Government from assisting Poland;

(k) He played a role in waging the wars of aggression, including commanding the Luftwaffe in the attack on Poland and the subsequent aggressive wars;

(l) Although he claimed to initially oppose Hitler's plans against Norway and the Soviet Union for strategic reasons, he followed Hitler without hesitation once the decision was made;

(m) He played an active role in preparing and executing the campaigns against Yugoslavia and Greece.[84]

a. High-level positions, influence and knowledge

65. The Nuremberg Tribunal emphasized that Göring held high-level positions in the Nazi regime, he greatly influenced Hitler and he knew of all important military and political problems:

> "The evidence shows that, after Hitler, he was the most prominent man in the Nazi regime. He was Commander-in-Chief of the Luftwaffe, Plenipotentiary for the Four Year Plan and had tremendous influence with Hitler, at least until 1943 when their relationship deteriorated, ending in his arrest in 1945. He testified that Hitler kept him informed of all important military and political problems."[85]

b. Conclusion

66. The Tribunal concluded as follows:

> "After his own admissions to this Tribunal, from the positions which he held, the conferences he attended and the public words he uttered, there can remain no doubt that Göring was the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued."[86]

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[83] Ibid., p. 226.

[84] Ibid., pp. 279-280, 282.

[85] Ibid., p. 279.

[86] Ibid., p. 280.

(ii) Hess

67. The Nuremberg Tribunal convicted the defendant Hess of counts one and two after considering his relationship with Hitler; his high-level positions in the Nazi Party and the Government; his knowledge of the aggressive plans; and his participation in the acts of aggression and aggressive war:

(a) He influenced Hitler as his closest personal confidant;

(b) He held high-level positions in the Nazi Party and the Government;

(c) As Deputy Führer, he was the top man in the Nazi Party, he was responsible for handling all Party matters and he had decision-making authority on all questions of party leadership;

(d) As Reich Minister without Portfolio, he had the authority to approve all legislation before its enactment;

(e) As Deputy Führer and Reich Minister, he actively supported the preparations for war, for example, by signing the compulsory military service law;

(f) He publicly supported Hitler's vigorous rearmament policy;

(g) He was an informed and willing participant in the German aggression against Austria, Czechoslovakia and Poland;

(h) He was in contact with and gave instructions to the illegal Nazi Party in Austria, he was in Vienna when the German troops moved in, he signed the law for the reunion of Austria with the German Reich, he participated in the administration of Austria and he publicly praised the steps leading to the Austrian Anschluss and defended the German occupation of Austria;

(i) He was in contact with the head of the Sudeten German Party in Czechoslovakia, he arranged for the carrying out of Hitler's orders to make the Nazi Party machinery available for a secret mobilization, he signed the decree setting up the Government of the Sudetenland in Czechoslovakia as an integral part of the Reich, he participated in the administration of the Sudetenland, he absorbed the Sudeten German Party into the Nazi Party and he publicly stated that Hitler had been prepared to resort to war if necessary to acquire the Sudetenland;

(j) He publicly praised Hitler's "magnanimous offer" to Poland, he criticized Poland for agitating for war and the United Kingdom for Poland's attitude, and he signed the decrees incorporating Danzig (Gdansk) and certain Polish territories into the Reich as well as setting up the General Government in Poland.[87]

a. Knowledge and participation

68. The Tribunal found that Hess must have known of Hitler's aggressive plans at an early stage because of their close relationship and he took action to carry them out whenever necessary:

> "These specific steps which this defendant took in support of Hitler's plans for aggressive action do not indicate the full extent of his responsibility. Until his flight to England, Hess was Hitler's closest personal confidant. Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary."[88]

b. Defence claim of peaceful aims

69. The Tribunal found that Hess's speeches expressing a desire for peace did not negate his knowledge of Hitler's ambitions and willingness to resort to force to achieve his aims:

> "But nothing which they [Hess's speeches] contained can alter the fact that of all the defendants none knew better than Hess how determined Hitler was to realize his ambitions, how fanatical and violent a man he was, and how little likely he was to refrain from resort to force, if this was the only way in which he could achieve his aims."[89]

70. The Tribunal discounted Hess's flight to the United Kingdom to convey peace proposals that Hitler was allegedly prepared to accept, based on its proximity to the date set for the attack on the Soviet Union and his subsequent support for Germany's aggressive actions:

> "With him on his flight to England, Hess carried certain peace proposals which he alleged Hitler was prepared to accept. It is significant to note that this flight took place only 10 days after the date on which Hitler fixed, 22 June 1941, as

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[87] Ibid., pp. 282-285.

[88] Ibid., p. 284.

[89] Ibid., p. 283.

the time for attacking the Soviet Union. In conversations carried on after his arrival in England Hess wholeheartedly supported all Germany's aggressive actions up to that time, and attempted to justify Germany's action in connection with Austria, Czechoslovakia, Poland, Norway, Denmark, Belgium and the Netherlands. He blamed England and France for the war."[90]

(iii) von Ribbentrop

71. The Nuremberg Tribunal convicted the defendant von Ribbentrop of counts one and two after considering his relationship with Hitler; his high-level positions in the Government; his knowledge of the aggressive plans; and his participation in the acts of aggression and aggressive war:

(a) He was Foreign Policy Adviser to Hitler, representative of the Nazi Party on foreign policy and Foreign Minister;

(b) He negotiated the Anglo-German Naval Agreement of 1935 and the Anti-Comintern Pact of 1936;

(c) He sent a memorandum to Hitler advising him that a change in the East could only be carried out by force and suggesting methods to prevent the United Kingdom and France from intervening in a resulting European war;

(d) He attended the conference between Hitler and the Austrian Chancellor Schuschnigg at which Austria was forced by threatened invasion to make concessions aimed at strengthening the Nazis in Austria, he informed the British Government that Germany had not presented Austria with an ultimatum and he signed the law incorporating Austria into the German Reich;

(e) He participated in the aggressive plans against Czechoslovakia, he was in contact with and gave instructions to the Sudeten German Party to preserve the issue of the Sudeten Germans as a possible excuse for Germany's planned attack against Czechoslovakia, he participated in a conference to obtain Hungarian support for such a war, he tried to use diplomatic pressure to occupy the remainder of Czechoslovakia, he was instrumental in the Slovaks proclaiming their independence, he attended the conference with Hitler and President Hacha at which Czechoslovakia was compelled by threatened invasion to consent to German occupation and he signed the law establishing a protectorate over Bohemia and Moravia after German troops marched in;

(f) He played a particularly significant role in the diplomatic activity leading up to the attack on Poland, including participating in a conference to obtain Italian support for this war and entering into bad-faith negotiations with the British Government with the aim of preventing aid to Poland rather than settling the dispute;

(g) He had advance knowledge of the attacks on Norway, Denmark, Belgium, the Netherlands and Luxembourg and prepared the official Foreign Office memoranda attempting to justify these aggressive actions;

(h) He attended the conference at which Hitler and Mussolini discussed the proposed attack on Greece and the conference at which Hitler obtained permission from Prime Minister Antonescu for German troops to go through Romania for the attack, he gave false assurances to Yugoslavia concerning respect for its sovereignty and territorial integrity after it adhered to the Axis Tripartite Pact and he attended the meeting after the coup d'état in Yugoslavia when plans were made to carry out Hitler's announced intention to destroy it;

(i) He attended a conference with Hitler and Antonescu concerning Romanian participation in the attack on the Soviet Union, he participated in the preliminary planning for the political exploitation of Soviet territories and he urged Japan to attack the Soviet Union after the outbreak of war.[91]

(iv) Keitel

72. The Nuremberg Tribunal convicted the defendant Keitel of counts one and two after considering his high-level position in the military; his knowledge of the aggressive plans; and his participation in the acts of aggression and aggressive war:

(a) He became Chief of the High Command of the Armed Forces (without command authority) in 1938 when Hitler took command of the armed forces;

(b) He attended the conference with Hitler and Chancellor Schuschnigg, he joined Hitler in pressuring Austria with false rumours, broadcasts and troop manoeuvres, he made the military and other arrangements concerning Austria, he briefed Hitler and his generals after Schuschnigg called for a plebiscite and he initialled Hitler's plan for Austria;

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[90] Ibid., p. 284.

[91] Ibid., pp. 285-286.

(c) He signed many directives and memoranda concerning the aggressive plans for Czechoslovakia, he initialled Hitler's directive for the attack on Czechoslovakia and issued two supplements, and he attended Hitler's meeting with President Hacha at which the latter surrendered;

(d) He attended the meeting at which Hitler announced his decision to attack Poland and he signed the directive requiring the Wehrmacht (German Army) to submit its timetable for the attack on Poland;

(e) He discussed with Hitler and others the invasion of Norway and Denmark and the Norway plans were placed under his "direct and personal guidance" by a directive;

(f) He attended the meeting at which Hitler said he would ignore the neutrality of Belgium and the Netherlands, and he signed the orders for the attacks on those countries;

(g) He heard Hitler disclose his plans for the complete occupation of Greece and the destruction of Yugoslavia with "unmerciful harshness";

(h) Although he claimed that he opposed the invasion of the Soviet Union for military reasons and as a violation of the non-aggression pact, he initialled the aggressive plans for the Soviet Union which were signed by Hitler, he attended a meeting at which Hitler discussed the plans, he issued a supplement establishing the relationship between military and political officers, he issued the timetable for the invasion, he attended the final military briefing before the attack, he appointed representatives on matters concerning the Eastern Territories and he directed all army units to carry out Göring's economic directives for exploiting Russian territory, food and raw materials.[92]

(v) Rosenberg

73. The Nuremberg Tribunal convicted the defendant Rosenberg of counts one and two after considering his high-level positions in the Nazi Party and the Government; his knowledge of the aggressive plans; his participation in planning and preparing for the attack on Norway; and his participation in the administration of occupied countries:

(a) In 1930 he was elected to the Reichstag and became the Nazi Party's representative for Foreign Affairs;

(b) In 1933 he was made Reichsleiter (rank roughly second in importance to the Führer) and head of the Office of Foreign Affairs of the Nazi Party and in his latter capacity he was in charge of an organization whose agents were active in Nazi intrigue around the world;

(c) He was the Nazi Party's ideologist, in 1934 he was appointed by Hitler as his deputy to supervise the spiritual and ideological training of the Nazi Party, and he developed and spread Nazi doctrines in the newspapers he edited and the numerous books he wrote;

(d) He was one of the originators of the plan to attack Norway, he was influential in Hitler's decision to attack Norway, he played an important role in preparing and planning the attack, he arranged for close collaboration between the traitor Quisling and the Nazis, and he was assigned by Hitler to the political exploitation of Norway;

(e) He bore major responsibility for formulating and executing the occupation policies in the Occupied Eastern Territories, he was informed by Hitler of the planned attack against the Soviet Union and agreed to help as a political adviser, in 1941 he was appointed Commissioner for the Central Control of Questions connected with the East European Region, he prepared the occupation plans based on numerous conferences with high Reich officials, he prepared the draft instructions for setting up the administration of the Occupied Eastern Territories, he gave a speech concerning the problems and policies of the occupation two days before the attack, he attended Hitler's conference concerning the administration and occupation policies for the Soviet Union and he was appointed Reich Minister for the Occupied Eastern Territories by Hitler and charged with responsibility for civil administration.[93]

(vi) Raeder

74. The Nuremberg Tribunal convicted the defendant Raeder of counts one and two after considering his high-level positions in the military; his knowledge of the aggressive plans; and his participation in the acts of aggression and aggressive war:

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[92] Ibid., pp. 288-289 and 291.

[93] Ibid., pp. 293-296.

(a) He was a member of the Reich Defence Council, Chief of Naval Command, Supreme Commander and Gross-Admiral in the German Navy, which he commanded, built and directed for 15 years from 1928 to 1943;

(b) He accepted full responsibility for the Navy until his retirement in 1943;

(c) He admitted that the Navy violated the Treaty of Versailles but claimed that the violations were for the most part minor;

(d) He attended high-level meetings and had discussions with Hitler concerning plans or preparations for aggression;

(e) He received directives concerning the aggression against Austria, Czechoslovakia, Poland, Norway and Yugoslavia and the attack in the West, including the directives requiring special preparations for war against Austria and navy support for the German Army in Poland;

(f) He conceived the idea to invade Norway to obtain advantageous naval bases, which he discussed with Hitler and other high-level officials, but he claimed that his actions were "a move to forestall the British";

(g) He urged Hitler to occupy all of Greece, but he claimed that this was only after the British had landed and Hitler had ordered the attack;

(h) He urged Hitler to give priority to the war against the United Kingdom as the main enemy, to continue submarine and naval air force construction, not to attack Russia before the United Kingdom was defeated and to pursue an aggressive Mediterranean policy as an alternative to attacking Russia;

(i) Once the decision was made to attack the Soviet Union, he gave permission to attack Russian submarines before the invasion of the Soviet Union (which he initially opposed for strategic reasons) but claimed that this was in response to their observation of German activities.[94]

75. The Tribunal concluded as follows: "It is clear from this evidence that Raeder participated in the planning and waging of aggressive war."[95]

(vii) Jodl

76. The Nuremberg Tribunal convicted the defendant Jodl of counts one and two after considering his high-level positions in the military; his relationship with Hitler; his knowledge of the aggressive plans; and his participation in the acts of aggression and aggressive war:

(a) He was Chief of the National Defence Section in the High Command from 1935 to 1938, in command of troops from 1938 to 1939 and became Chief of the Operations Staff of the High Command of the Armed Forces in 1939;

(b) He reported directly to Hitler on operational matters rather than his immediate supervisor, the defendant Keitel;

(c) He was instructed by Hitler to maintain the military pressure on Austria by simulating military measures, he initialled the directive to prepare for the aggression against Austria after Hitler gave the order and he issued supplementary instructions and initialled Hitler's order for the invasion;

(d) He was very active in planning the attack on Czechoslovakia, he initialled documents concerning the attack, he agreed with the timing of the incident to provide an excuse for German intervention, he conferred with the propaganda experts on common tasks such as refuting German violations of international law and he took up a command post shortly after the Sudeten occupation;

(e) He discussed the Norway invasion with Hitler and other high-level officials; his diary confirmed his activities in planning this attack, but he claimed that the invasion was a necessary move to forestall the British;

(f) He knew of Hitler's plan to attack the West through Belgium, he discussed with high-level officials the alternative plan of attacking Norway, Denmark and the Netherlands and he initialled orders delaying the attack because of weather conditions, etc.;

(g) He was active in the planning against Greece and Yugoslavia; he initialled Hitler's order to intervene in Albania; and he attended the meetings where Hitler told German and Italian generals that German troops in Romania would be used against Greece, Hitler told Raeder that all Greece must be occupied, Hitler told the German High Command that the destruction of Yugoslavia should be accomplished with "unmerciful harshness" and when the decision was made to bomb Belgrade without a declaration of war;

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[94] Ibid., pp. 315-317.

[95] Ibid., p. 316.

(h) Although he claimed that Hitler had attacked Russia because of fear of being attacked, Jodl gave instructions to prepare plans for the attack based on Hitler's decision months in advance, he initialled Hitler's directive to continue preparations for the attack and the plans for the attack, he discussed the invasion with Hitler and other high-level officials and he was present when the final reports were made.[96]

a. Defence claim: superior orders

77. In his defence, Jodl claimed that he was merely a soldier obeying orders, he was not a politician and he tried to obstruct some measures by delay:

> "Jodl defends himself on the ground he was a soldier sworn to obedience, and not a politician; and that his staff and planning work left him no time for other matters. He said that when he signed or initialled orders, memoranda and letters, he did so for Hitler and often in the absence of Keitel. Though he claims that as a soldier he had to obey Hitler, he says that he often tried to obstruct certain measures by delay, which occasionally proved successful, as when he resisted Hitler's demand that a directive be issued to lynch Allied 'terror fliers'."[97]

b. Conclusion

78. The Tribunal found that "in the strict military sense, Jodl was the actual planner of the war and responsible in large measure for the strategy and conduct of operations."[98]

(viii) von Neurath

79. The Nuremberg Tribunal convicted the defendant von Neurath of counts one and two after considering his high-level positions in the Government; his relationship with Hitler; his knowledge of the aggressive plans; and his participation in the acts of aggression against Austria and Czechoslovakia:

(a) He was a professional diplomat, German Ambassador to the United Kingdom from 1930 to 1932, Minister for Foreign Affairs from 1932 until he resigned in 1938, after which he was Reich Minister without Portfolio, President of the Secret Cabinet Council and a member of the Reich Defence Council;

(b) As Foreign Minister, he advised Hitler concerning Germany's withdrawal from the Disarmament Conference and the League of Nations in 1933, the institution of rearmament, the passage of the universal military service law and the secret Reich Defence Law;

(c) He was a key figure in negotiating the 1935 Anglo-German Naval Accord;

(d) He played an important part in Hitler's decision to reoccupy the Rhineland, which he predicted could be carried out without French reprisals;

(e) He was in charge of the Foreign Office when Austria was occupied and assured the British Ambassador that this was not the result of a German ultimatum;

(f) He informed the Czechoslovakian Minister that Germany intended to abide by arbitration convention between the two countries;

(g) He participated in the final phase of the negotiations preceding the Munich Pact, but claimed that he urged Hitler to reach a peaceful settlement.[99]

Knowledge

80. The Tribunal considered von Neurath's claim that he was shocked when he learned of Hitler's aggressive plans and subsequently resigned. However, the Tribunal noted that he retained a formal relationship with the Nazi regime with knowledge of Hitler's aggressive plans:

> "Von Neurath took part in the Hossbach conference of 5 November 1937. He had testified that he was so shocked by Hitler's statements that he had a heart attack. Shortly thereafter he offered to resign, and his resignation was accepted on 4 February 1938 ... Yet with knowledge of Hitler's aggressive plans he retained a formal relationship with the Nazi regime as Reich Minister without Portfolio, President of the Secret Cabinet Council and a member of the Reich Defence Council."[100]

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[96] Ibid., pp. 322-325.

[97] Ibid., p. 322.

[98] Ibid., p. 322.

[99] Ibid., pp. 333-334 and 336.

[100] Ibid., p. 334.

(b) Defendants acquitted of count one and convicted of count two

(i) Frick

81. The Nuremberg Tribunal acquitted Frick of count one after finding that he was not a member of the common plan or conspiracy to wage aggressive war because he had not attended the conferences at which Hitler outlined his aggressive plans and his activities had been limited to domestic administration before the Austria aggression:

> "Before the date of the Austria aggression Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently, the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment."[101]

82. The Tribunal convicted Frick of count two after considering his high-level positions in the Government; his knowledge of the aggressive plans; and his participation in preparing for aggression and administering the occupied countries:

(a) He was Reich Minister of the Interior from Hitler's first cabinet until 1943, Reich Protector of Bohemia and Moravia, Prussian Minister of the Interior, Reich Director of Elections, General Plenipotentiary for the Administration of the Reich, a member of the Reich Defence Council and the Ministerial Council for Defence of the Reich and head of the central offices for the incorporation of occupied territories;

(b) He was the chief Nazi administrative specialist and bureaucrat and his duties were at the centre of all internal and domestic administration;

(c) As Interior Minister, he was largely responsible for bringing Germany under complete Nazi control by incorporating local governments under the sovereignty of the Reich and by drafting, signing and administering numerous laws to abolish opposition parties and to prepare for the Gestapo and their concentration camps to extinguish individual opposition;

(d) He was largely responsible for and ruthlessly efficient with respect to the legislation to suppress the trade unions, the church and the Jews;

(e) After the seizure of Austria, he became General Plenipotentiary for the Administration of the Reich and was made responsible for war administration (except military and economic) if Hitler proclaimed a state of defence;

(f) He devised an administrative organization for wartime which was put into operation after Germany adopted a policy of war;

(g) He signed the law uniting Austria with the Reich and was responsible for its implementation, including setting up the German administration in Austria, issuing decrees introducing German law, the Nuremberg decrees and the Military Service Law, and providing for police security under Himmler;

(h) He signed the laws incorporating several other occupied territories into the Reich, he was in charge of their incorporation and the establishment of their German administration and he signed the law establishing the Protectorate of Bohemia and Moravia;

(i) He was responsible for ensuring close cooperation between German officials in occupied countries and the supreme authorities of the Reich;

(j) He supplied German civil servants for the administrations in all occupied territories.[102]

(ii) Funk

83. The Nuremberg Tribunal acquitted the defendant Funk of count one after finding that he had become an active participant only after the aggressive plans were clearly defined; he was not a leading figure in originating the Nazi plans for aggressive war; and his criminal participation in preparing rather than planning for aggressive war could be dealt with under count two:

> "Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined ...
>
> "...
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> "Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Göring as Plenipotentiary General of the Four Year Plan. He did, however, participate in the economic preparation for certain aggressive wars, notably those against Poland and

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[101] Ibid., p. 299.

[102] Ibid., pp. 298-301.

the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment."[103]

84. The Tribunal convicted Funk of count two after considering his relationship with Hitler; his high-level positions in the Nazi Party, the Government and finance; his knowledge of the aggressive plans; and his participation in the financial and economic planning and preparation for aggression:

(a) He became Hitler's personal economic adviser in 1931; Press Chief in the Reich Government, Under Secretary in the Ministry of Propaganda and a leading figure in the Nazi organizations used to control the press, films, music and publishing houses in 1933; Minister of Economics and Plenipotentiary General for War Economy in 1938; President of the Reichsbank and a member of the Ministerial Council for the Defence of the Reich in 1939; and a member of the Central Planning Board in 1943;

(b) His representative attended the meeting at which Göring announced a huge increase in armaments and gave instructions to increase exports to obtain the necessary foreign exchange in 1938, his subordinate sent a memorandum concerning the use of prisoners of war to make up labour deficiencies resulting from a mobilization in 1939 and he attended a meeting concerning detailed planning for financing the war in 1939;

(c) In 1939, he wrote a letter to Hitler indicating that he was grateful to be able to participate in such world-shaking events; his plans for financing the war, controlling wage and price conditions and strengthening the Reichsbank had been completed; and he had inconspicuously transferred all of Germany's available foreign exchange resources into gold;

(d) After the war had begun, he gave a speech stating that the economic and financial departments of Germany had been secretly engaged in the economic preparation for war under the Four Year Plan for over a year;

(e) He participated in the economic planning preceding the attack on the Soviet Union, including plans for printing rouble notes in Germany before the attack to serve as occupation currency;

(f) After the attack on the Soviet Union, he gave a speech describing plans for the economic exploitation of the Soviet Union as a source of raw materials for Europe.[104]

(iii) Dönitz

85. The Nuremberg Tribunal acquitted the defendant Dönitz on count one after finding that he had not been privy to the conspiracy and he did not know about the plans to wage aggressive war. The Tribunal also found that he was not guilty of preparing or initiating aggressive war under count two because of his position and duties at the time. The Tribunal observed:

> "Although Dönitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared or initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there."[105]

86. The Tribunal convicted Dönitz of count two after considering his high-level positions in the military; his relationship with Hitler; his knowledge of the aggressive policies; and his participation in waging aggressive war:

(a) He took command of the U-boat flotilla in 1935 and he became commander of the submarine arm in 1936, Vice-Admiral in 1940, Admiral in 1942 and Commander-in-Chief of the German Navy in 1943;

(b) He commanded the U-boats which were prepared to wage war and constituted the principal part of the German fleet;

(c) He was solely responsible for the submarine warfare which damaged and sank millions of tons of Allied and neutral shipping;

(d) He made recommendations concerning submarine bases in Norway and he gave the operational orders for the supporting U-boats in the invasion of Norway;

(e) From 1943, he was consulted almost continuously by Hitler and conferred with him on naval problems about 120 times during the war;

(f) In 1945, he urged the Navy to continue its fight when he knew the struggle was hopeless;

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[103] Ibid., pp. 304-305.

[104] Ibid., pp. 304-305, 307.

[105] Ibid., p. 310.

(g) After succeeding Hitler as Head of State, he ordered the German armed forces to continue the war in the East until capitulation in 1945, which he claimed was to ensure the evacuation of the German population and the orderly retreat of the Army from the East.[106]

High-level position, participation and significant contribution

87. The Tribunal emphasized the importance of his position rather than his title; his leadership role, decision-making authority and active participation in waging aggressive war; and his significant contribution to waging aggressive war:

> "Dönitz did, however, wage aggressive war within the meaning of that word as used by the Charter. Submarine warfare, which began immediately upon the outbreak of war, was fully coordinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war.
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> "It is true that until his appointment in January 1943 as Commander-in-Chief he was not an 'Oberbefehlshaber' [Supreme Commander, Commander-in-Chief]. But this statement underestimates the importance of Dönitz' position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Dönitz was its leader. The High Seas fleet made a few minor, if spectacular, raids during the early years of the war, but the real damage to the enemy was done almost exclusively by his submarines, as the millions of tons of Allied and neutral shipping sunk will testify. Dönitz was solely in charge of this warfare. The Naval War Command reserved for itself only the decision as to the number of submarines in each area ...
>
> "That his importance to the German war effort was so regarded is eloquently proved by Raeder's recommendation of Dönitz as his successor and his appointment by Hitler on 30 January 1943 as Commander-in-Chief of the Navy. Hitler, too, knew that submarine warfare was the essential part of Germany's naval warfare.
>
> "...
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> "In the view of the Tribunal, the evidence shows that Dönitz was active in waging aggressive war."[107]

(iv) Seyss-Inquart

88. The Nuremberg Tribunal acquitted the defendant Seyss-Inquart of count one without giving a specific reason. It did not discuss any evidence of his knowledge or participation with respect to the common plan or conspiracy to wage aggressive war.

89. The Tribunal convicted Seyss-Inquart of count two after considering his high-level positions concerning occupied countries and his participation in the administration of those countries as vitally important to waging aggressive war:

(a) He became State Councillor in Austria in 1937 as a result of German pressure, Austrian Minister of Security and Interior with control over the police at Hitler's insistence in 1938, Chancellor of Austria as a result of German threats of invasion, President and later Reich Governor of Austria after President Miklas resigned in 1938, Reich Minister without Portfolio in 1939, Chief of Civil Administration in South Poland and Deputy Governor General of the General Government of Poland in 1939, and Reich Commander for Occupied Netherlands in 1940;

(b) He participated in the final stages of Nazi intrigue preceding the German occupation of Austria;

(c) He met Hitler at Linz, Austria, welcomed the German forces, advocated the reunion of Germany and Austria and obtained passage of the law incorporating Austria as a province of Germany, which President Miklas refused to sign, in 1938;

(d) He induced the Slovakian Cabinet to declare independence in accordance with Hitler's offensive against the independence of Czechoslovakia;

(e) He was responsible for governing territory occupied through aggressive wars and the administration of which was vitally important in the aggressive war waged by Germany, he supported harsh occupation policies in Poland, which he stated would be administered to exploit its economic resources for the benefit of Germany, and he adopted a policy of maximum utilization of the economic potential of the Netherlands.[108]

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[106] Ibid., pp. 310-311, 315.

[107] Ibid., pp. 310-311.

[108] Ibid., pp. 327-328, 330.

(c) Defendants acquitted of counts one and two

(i) Schacht

90. The Nuremberg Tribunal began by considering Schacht's high-level positions in the financial and economic sphere, his participation in the rearmament of Germany and his participation in the aggression against Austria and Czechoslovakia:

(a) He was Commissioner of Currency from 1923 to 1930, President of the Reichsbank from 1923 to 1930 and from 1933 until he was dismissed in 1939, Minister of Economics from 1934 until he resigned in 1937, Plenipotentiary General for War Economy from 1935 until he resigned in 1937, and Minister without Portfolio from 1937 until he was dismissed in 1943;

(b) He was an active supporter of the Nazi Party before its accession to power in 1933;

(c) He supported Hitler's appointment as Chancellor, after which he played an important role in the vigorous rearmament programme;

(d) As President, he used the Reichsbank to the fullest extent in the German rearmament effort, including issuing long-term government loans and short-term notes to finance the rearmament;

(e) As Minister of Economics and Plenipotentiary General for War Economy, he was active in organizing the German economy for war, including making detailed plans for industrial mobilization and the coordination of the Army with industry in the event of war, starting a stockpiling scheme to address shortages of raw materials and a system of foreign exchange control to prevent Germany's weak position from hindering the acquisition abroad of raw materials needed for rearmament;

(f) In 1935, he sent a memorandum to Hitler stating that everything should be subordinated to the armament programme;

(g) He supported and participated in a minor way in the early Nazi aggressions in Austria and Czechoslovakia by setting the foreign exchange rate before the occupation of Austria; arranging for the incorporation of the Austrian National Bank into the Reichsbank after the occupation; giving a violently pro-Nazi speech indicating that the Reichsbank would always be Nazi, praising Hitler and defending the occupation of Austria; arranging for currency conversion and the incorporation of local Czech banks into the Reichsbank after the occupation of the Sudetenland; and giving a speech indicating that his economic policy had created the high degree of German armament necessary for Germany's foreign policy.[109]

91. The Tribunal referred to Germany's conduct with respect to Austria and Czechoslovakia as aggression, although it later noted that this conduct was not charged as aggressive war.

92. On the other hand, the Tribunal also considered Schacht's loss of influence to Göring, his concern about the effect of the rearmament programme on the German economy, his advocacy of limiting the rearmament programme for financial reasons and his efforts to slow down the rearmament programme:

(a) By 1936, Schacht began losing his influence as the central figure in the rearmament programme to Göring, who was appointed Coordinator for Raw Materials and Foreign Exchange and Plenipotentiary of the Four Year Plan entrusted with preparing the German economy for war;

(b) Schact opposed the Four Year Plan and Göring's proposed expansion of production facilities as being uneconomical, causing financial strain and risking inflation;

(c) He advocated a retrenchment in the rearmament programme, a drastic tightening of government credit and a cautious policy for Germany's foreign exchange reserves;

(d) Hitler viewed Schacht's economic policies as too conservative for the drastic rearmament policy;

(e) Schacht resigned as Minister of Economics and Plenipotentiary General for War Economy in 1937 after Hitler accused him of upsetting his plans by financial means;

(f) As President of the Reichsbank, he continued to issue long-term government loans but not short-term notes to finance rearmament, he refused to issue a special credit to pay civil servant salaries not covered by existing funds in 1938, he urged Hitler to reduce armament expenditures in 1939 and he sent Hitler a report from the directors of the bank urging a drastic reduction of armament expenditure and a balanced budget to prevent inflation in 1939;

(g) Hitler dismissed Schacht as President of the Reichsbank in 1939 and as Minister without Portfolio in 1943 because of his "whole attitude during the present fateful fight of the German Nation";

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[109] Ibid., pp. 307, 309.

(h) Schacht was arrested by the Gestapo in 1944 and confined to a concentration camp until the end of the war.[110]

a. Rearmament as a crime against peace

93. While recognizing that Schacht played an important role in the German rearmament, the Nuremberg Tribunal held that rearmament is not a crime unless it is carried out as part of a plan to wage aggressive war:

> "It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."[111]

94. The Tribunal noted that Schacht claimed that he had participated in the rearmament programme to build a strong and independent Germany equal to other European countries, he was opposed to Hitler's policy of rearmament for aggressive purposes and he tried to slow down the rearmament when he learned of this policy:

> "Schacht has contended that he participated in the rearmament programme only because he wanted to build up a strong and independent Germany which would carry out a foreign policy which would command respect on an equal basis with other European countries; that when he discovered that the Nazis were rearming for aggressive purposes he attempted to slow down the speed of rearmament; and ... he participated in plans to get rid of Hitler, first by deposing him and later by assassination."[112]

95. The Tribunal also noted that Schacht had advocated limiting rearmament for financial reasons as early as 1936, that Germany would not have been prepared for a general war if his policies had been followed and that Schacht was dismissed from his positions for insisting on those policies. However, the Tribunal also found that he was in a position to understand the significance of Hitler's rearmament and to realize that the economic policy adopted could only be for the purpose of war:

> "Schacht, as early as 1936, began to advocate a limitation on the rearmament programme for financial reasons. Had the policies advocated by him been put into effect, Germany would not have been prepared for a general European war. Insistence on his policies led to his eventual dismissal from all positions of economic significance in Germany. On the other hand, Schacht, with his intimate knowledge of German finance, was in a particularly good position to understand the true significance of Hitler's frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object."[113]

b. Knowledge and participation

96. The Nuremberg Tribunal acquitted Schacht of count one after finding that he was not one of Hitler's inner circle which was most involved in the common plan, there was insufficient evidence to support the inference that he knew of the aggressive plans and his conduct with respect to Austria and Czechoslovakia did not constitute participation in the common plan:

> "His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charged in Count One. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this group with undisguised hostility. The testimony of Speer shows that Schacht's arrest on 23 July 1944 was based as much on Hitler's enmity towards Schacht growing out of his attitude before the war as it was on suspicion of his complicity in the bomb plot. The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans.
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> "On this all-important question evidence has been given for the Prosecution, and a considerable volume of evidence for the Defence. The Tribunal has considered the whole of this evidence with great care, and comes to the conclusion that this

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[110] Ibid., pp. 307-308.

[111] Ibid., pp. 308-309.

[112] Ibid., p. 309.

[113] Ibid.

> necessary inference has not been established beyond a reasonable doubt."[114]

97. The Tribunal also acquitted Schacht of count two after finding that "Schacht was not involved in the planning of any of the specific wars of aggression charged in Count Two".[115]

(ii) Sauckel

Sufficient connection and involvement

98. The Tribunal began by reviewing the positions that Sauckel had held in the Nazi Party and the Government, which were not at the national level, except for becoming a member of the Reichstag in 1933. The Tribunal acquitted the defendant Sauckel on counts one and two after finding that he had not been sufficiently connected with or involved in planning or waging aggressive war:

> "The evidence has not satisfied the Tribunal that Sauckel was sufficiently connected with the common plan to wage aggressive war or sufficiently involved in the planning or waging of the aggressive wars to allow the Tribunal to convict him on Counts One or Two."[116]

(iii) von Papen

99. The Tribunal began by reviewing von Papen's high-level positions in the Government as well as his participation in the consolidation of Nazi control and the annexation of Austria:

(a) He was Chancellor of the Reich in 1932, Vice Chancellor in Hitler's cabinet and Plenipotentiary for the Saar in 1933, Minister to Vienna from 1934 until he was recalled in 1938 and Ambassador to Turkey from 1939 until Germany and Turkey severed diplomatic relations in 1944;

(b) He was active in helping Hitler form the Coalition Cabinet and helped him become Chancellor from 1932 to 1933;

(c) As Vice Chancellor, he participated in the Nazi consolidation of control in 1933;

(d) After publicly denouncing Nazi policies in June 1934, he was appointed Minister to Austria by Hitler, instructed to direct relations with Austria "into normal and friendly relations" after the assassination of Dolfuss, and assured of Hitler's "complete and unlimited confidence";

(e) He actively tried to strengthen the Nazi Party in Austria for the purpose of bringing about the Anschluss;

(f) He attended a meeting at which the policy was established to avoid giving the appearance of German intervention in Austria's internal affairs in 1935;

(g) He arranged for money to be transferred to the "persecuted" Nazis in Austria, he reported to Hitler on his meeting with the leader of the Austrian Nazis, he was involved in Nazi political demonstrations, he supported Nazi propaganda activities and he submitted detailed reports on Nazi activities and Austrian military defences;

(h) His policy resulted in a 1936 agreement restoring normal and friendly relations between Austria and Germany and secretly providing for an amnesty for Austrian Nazis, lifting censorship of Nazi papers, resuming Nazi political activities and appointing pro-Nazis to the Cabinet;

(i) After his offer to resign following this agreement was rejected, he continued to pressure Austria to include Nazis in the cabinet and advised Hitler to intensify pressure on the Austrian Ministry of Security, which was preventing the infiltration of Nazis into the Austrian Government;

(j) He arranged and attended the meeting between Hitler and Schuschnigg and advised the latter to comply with Hitler's demands;

(k) He was in the Chancellery when the occupation of Austria was ordered.

100. On the other hand, the Tribunal also noted that von Papen had publicly denounced Nazi policies as early as 1934, he retired after the annexation of Austria and he was not implicated in any subsequent crimes:

(a) He gave a speech denouncing Nazi attempts to suppress the free press and the church, the reign of terror and the Nazis' mistaking "brutality for vitality" in June 1934;

(b) Shortly after he gave this speech, he was taken into custody by the SS, his staff was arrested and two of his associates were murdered;

(c) As Minister to Vienna, he urged Hitler to recognize the national independence of Austria to help form a coalition between the Christian Socialists and the Nazis, and he reported to Hitler that the union of Austria and Germany could not be achieved by external pressure but only by the strength of the Nazi Party;

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[114] Ibid., pp. 309-310.

[115] Ibid., p. 309.

[116] Ibid., pp. 320-322.

(d) He was recalled as Minister in 1938 and ordered to return to Berlin;

(e) He retired after the annexation of Austria and was not implicated in any crimes in his subsequent position as Ambassador to Turkey.[117]

Support, participation and purpose

101. The Tribunal acquitted von Papen of counts one and two after finding no evidence that he had supported the decision to occupy Austria by force, that he was a party to planning aggressive war in terms of occupying Austria by aggressive war if necessary as a step towards further aggressive action or that his activity with respect to Austria was undertaken for that purpose:

> "No evidence has been offered showing that von Papen was in favor of the decision to occupy Austria by force, and he has testified that he urged Hitler not to take this step.
>
> "...
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> "The evidence leaves no doubt that von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about Anschluss. To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offences against political morality, however bad these may be. Under the Charter von Papen can be held guilty only if he was a party to the planning of aggressive war. There is no evidence that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary. But it is not established beyond a reasonable doubt that this was the purpose of his activity, and therefore the Tribunal cannot hold that he was a party to the common plan charged in Count One or participated in the planning of aggressive wars charged under Count Two."[118]

(iv) Speer

102. The Nuremberg Tribunal began by considering Speer's relationship to Hitler and his high-level positions in the Government:

(a) He became a close personal confidant of Hitler in 1934;

(b) He was a member of the Reichstag from 1941 until the end of the war and he became Reich Minister for Armaments, General Plenipotentiary for Armaments and a member of the Central Planning Board in 1942.[119]

Rearmament as a crime against peace

103. The Tribunal acquitted Speer of counts one and two after finding that he became head of the armaments industry after the wars had begun and his activities in charge of armament production did not constitute initiating, planning, preparing or waging aggressive war or conspiring to do so:

> "The Tribunal is of the opinion that Speer's activities do not amount to initiating, planning or preparing wars of aggression, or of conspiring to that end. He became head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two."[120]

(d) Defendants acquitted of count one and not charged with count two

(i) Kaltenbrunner

104. The Nuremberg Tribunal considered Kaltenbrunner's participation in the aggression against Austria and his subsequent high-level positions in the Austrian Government:

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[117] Ibid., pp. 325-327. "After the annexation of Austria von Papen retired into private life and there is no evidence that he took any part in politics. He accepted the position of Ambassador to Turkey in April 1939, but no evidence has been offered concerning his activities in that position implicating him in crimes." Ibid., p. 327.

[118] Ibid., p. 327.

[119] Ibid., pp. 330-331, 333.

[120] Ibid., pp. 330-331.

(a) As leader of the SS in Austria, he was active in Nazi intrigue against the Austrian Government;

(b) He commanded the Austrian SS men who surrounded the Federal Chancellery after Göring ordered the Austrian Nazis to seize control of the Government;

(c) After the Anschluss, he became Austrian State Secretary for Security, Higher SS and Police Leader, Chief of the Security Police and SD, and Head of the Reich Security Head Office.[121]

Direct participation

105. Noting that the aggression against Austria was not charged as an aggressive war, the Tribunal acquitted Kaltenbrunner of count one after finding insufficient evidence that he had directly participated in planning to wage aggressive war against any other country:

> "But there is no evidence connecting Kaltenbrunner with plans to wage aggressive war on any other front. The Anschluss, although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under Count One does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war."[122]

(ii) Frank

106. The Nuremberg Tribunal considered Frank's position in the German Government, the Nazi Party and academia: he became a member of the Reichstag in 1930, Reichsleiter of the Nazi Party in charge of Legal Affairs and President of the Academy of German Law in 1933, and Reich Minister without Portfolio in 1934.

Sufficient connection with the common plan

107. The Tribunal also noted that Frank had been dismissed as Reichsleiter of the Nazi Party and President of the Academy of German Law in 1942 after he disagreed with Himmler about the type of legal system for Germany.

108. The Tribunal acquitted Frank of count one because he had not been sufficiently connected with the common plan to wage aggressive war:

> "The evidence has not satisfied the Tribunal that Frank was sufficiently connected with the common plan to wage aggressive war to allow the Tribunal to convict him on Count One."[123]

(iii) Streicher

109. The Nuremberg Tribunal considered Streicher's support for the Nazi policies and his positions in the Government and the media:

(a) He was a staunch Nazi and supporter of Hitler's policies;

(b) He was Gauleiter of Franconia from 1925 to 1940 and was elected to the Reichstag in 1933.

Connection with the Common Plan

110. As in the case of Frank, the Tribunal acquitted Streicher of count one after finding that he was not connected with the common plan to wage aggressive war. The Tribunal found that Streicher was not one of Hitler's advisers, he was not a policy maker, he did not attend the conferences at which Hitler discussed his decisions and he did not know of those policies:

> "There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter [District Governor] there is no evidence to prove that he had knowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment."[124]

(iv) von Schirach

111. The Nuremberg Tribunal considered von Schirach's positions in the Nazi Party and the Government and his activities with respect to Nazi youth organizations:

(a) He became Reich Youth Leader of the Nazi Party, which controlled all Nazi youth organizations, including the Hitler Jugend (Hitler Youth), in 1931, Leader of Youth in the German Reich after the Nazis gained control of the Government in 1933, a member of the Reich Cabinet in 1936, Gauleiter and Reich

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[121] Ibid., pp. 291, 293.

[122] Ibid., p. 291.

[123] Ibid., pp. 296, 298.

[124] Ibid., pp. 301-302, 304.

Governor of Vienna and Reich Defence Commissioner for that territory in 1940, while retaining his position as Reichsleiter for Youth Education;

(b) He utilized physical violence and official pressure to extinguish or take over all youth groups competing with the Hitler Jugend, which he used to subject German youth to intensive Nazi propaganda and pre-military training and to provide the primary source of replacements for the SS;

(c) He reached an agreement with Keitel in 1939 under which the pre-military activities of the Hitler Jugend would be carried out under Wehrmacht standards and the Wehrmacht would train 30,000 Hitler Jugend instructors each year for this purpose.

Involvement and participation

112. The Tribunal acquitted von Schirach of count one after finding that he was not involved in developing Hitler's aggressive plans and he did not participate in planning or preparing for aggressive war:

> "Despite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that von Schirach was involved in the development of Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression."[125]

(v) Fritzsche

113. The Nuremberg Tribunal considered Fritzsche's positions and activities with the government news service:

(a) He was a radio commentator with a weekly news broadcast;

(b) He became head of the Wireless News Service in 1932, a Reich government agency which was incorporated by the Nazis into their Reich Ministry of Popular Enlightenment and Propaganda in 1933, head of the Home Press Division of the Ministry in 1938 and Ministerial Director, head of the Radio Division of the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater German Radio in 1942;

(c) As head of the Home Press Division, he supervised the German press consisting of 2,300 newspapers and gave daily press conferences to deliver the directives of the Propaganda Ministry to the press;

(d) As head of the Home Press Division, he also participated in the vigorous propaganda campaigns that preceded major acts of aggression, including instructing the press on how to deal with such acts against Bohemia and Moravia, Poland, Yugoslavia and the Soviet Union;

(e) As head of the Radio Division, he had sole authority within the Ministry for radio activities and he formulated and issued daily radio instructions to all Reich propaganda offices in accordance with Nazi political policies;

(f) He attended Goebbels's daily staff conferences to receive instructions on the news and propaganda policies;

(g) He briefly served in a propaganda company on the Eastern Front in 1942.

a. Subordinate position

114. On the other hand, the Tribunal noted the subordinate nature of his positions and the supervision of his activities:

(a) He was subordinate to the Reich Press Chief, Dietrich, who received the directives from Goebbels and other Reich Ministers and prepared the instructions for the press;

(b) He had no control over the formulation of propaganda policies and merely transmitted to the press the instructions he received from Dietrich;

(c) He formulated radio instructions subject to the directives of the Radio-Political Division of the Foreign Office and the personal supervision of Goebbels.

b. Knowledge and participation

115. The Tribunal acquitted Fritzsche of count one after finding that he had not achieved sufficient stature to attend the planning conferences for aggressive war, he was not informed of the resulting decisions and his activities did not constitute participation in planning to wage aggressive war:

> "This is the summary of Fritzsche's positions and influence in the Third Reich: Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war; indeed according to his own uncontradicted testimony he never even had a conversation with Hitler. Nor is

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[125] Ibid., pp. 317-318, 320.

there any showing that he was informed of the decisions taken at these conferences. His activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war as already set forth in this Judgment."[126]

(vi) Bormann

116. The Nuremberg Tribunal considered Bormann's positions in the Nazi Party as well as his power and influence:

(a) He was Reichsleiter from 1933 to 1945, Chief of Staff in the Office of the Führer's Deputy from 1933 to 1941, Head of the Party Chancellory as of 1941 and Secretary to the Führer as of 1943;

(b) He rose from a minor Nazi to a position of power and great influence over Hitler in the closing days;

(c) He was active in the Nazi Party's rise to power and its consolidation.

Knowledge

117. The Tribunal acquitted Bormann of count one after finding that he did not know of Hitler's aggressive plans and his positions when the plans were being formulated did not support a conclusive inference of knowledge:

> "The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece these plans for aggression. Nor can knowledge be conclusively inferred from the positions he held. It was only when he became head of the Party Chancellery in 1941, and later in 1943 Secretary to the Führer when he attended many of Hitler's conferences, that his positions gave him the necessary access. Under the view stated elsewhere which the Tribunal has taken of the conspiracy to wage aggressive war, there is not sufficient evidence to bring Bormann within the scope of Count One."[127]

II. Tribunals established pursuant to Control Council Law No. 10

A. Establishment

118. The Control Council for Germany adopted Law No. 10 on 20 December 1945 to give effect to the Moscow Declaration of 1943,[128] the London Agreement of 1945 and the Nuremberg Charter annexed thereto as well as to provide a uniform legal basis in Germany for the prosecution of criminals other than the major criminals dealt with by the Nuremberg Tribunal.[129]

119. The United States established military tribunals as part of the occupation administration for the American zone in Germany pursuant to Control Council Law No. 10. These tribunals conducted 12 trials from 1946 to 1949. Four of the cases dealt with charges of crimes against peace, namely, the *I.G. Farben* case, the *Krupp* case, the *High Command* case, and the *Ministries* case.

120. France also established the General Tribunal of the Military Government for the French Zone of Occupation in Germany pursuant to Control Council Law No. 10. This Tribunal conducted the *Roechling* trial, which involved charges of crimes against peace.

B. Jurisdiction

121. The Nuremberg Charter was an integral part of Control Council Law No. 10 which was to be applied

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[126] Ibid., pp. 336-338.

[127] Ibid., pp. 338-339, 341.

[128] The Declaration on German Atrocities (Moscow Declaration) of 1943 stated that the persons responsible for the atrocities committed by Nazi Germany would be sent to the countries where the crimes had been committed so that they could be tried for their crimes. The declaration was without prejudice to the major criminals whose crimes had no particular geographical location. The Nuremberg Charter subsequently provided for the trial of the major criminals of the European Axis whose crimes had no particular geographical location before the Nuremberg Tribunal as discussed above. The Moscow Declaration is reproduced in *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1951, vol. III, p. X.

[129] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, reproduced in *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1951, vol. III, p. XVIII (hereinafter Control Council Law No. 10).

by the Tribunals in the trials conducted after the trial of the major war criminals by the Nuremberg Tribunal. The Tribunals which conducted the subsequent trials considered themselves bound by the Charter and the Judgement of the Nuremberg Tribunal. The judgements rendered in the subsequent trials in many instances build upon the foundation provided by the Nuremberg Charter and Judgement of the Nuremberg Tribunal by clarifying or further elaborating the principles of international law contained therein.

122. Control Council Law No. 10 contained a definition of crimes against peace which was very similar to the definition contained in the Nuremberg Charter. There were two main differences between these definitions. Council Law No. 10 expressly included an invasion as well as a war in the definition of crimes against peace and expressly indicated the non-exhaustive nature of this definition by using the phrase "including but not limited to". Thus, the Tribunals were authorized pursuant to article II, paragraph 1 (a), of Control Council Law No. 10 to try and punish persons who had committed crimes against peace, namely, initiating invasions of other countries and aggressive wars in violation of international laws and treaties, including but not limited to planning, preparing, initiating or waging an aggressive war or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the above.[130]

123. The jurisdiction of the Nuremberg Tribunal was limited to the major war criminals of the European Axis. This limitation reflected the limited purpose for which the Nuremberg Tribunal had been established. Control Council Law No. 10 was intended to provide the basis for the subsequent trial of other war criminals. However, the jurisdiction of the Tribunals conducting these trials was limited with respect to crimes against peace to persons holding a high-level political, civil, military (including the General Staff), financial, industrial or economic position in Germany or one of its allies, co-belligerents or satellites. This limitation reflected the limited categories of persons capable of committing such crimes, as confirmed by the Judgement of the Nuremberg Tribunal. It was included in the provision setting forth the principles of individual criminal responsibility indicating the ways in which an individual could incur responsibility for the crimes covered by Control Council Law No. 10 (e.g., as a principal or an accessory).[131]

124. The United States Military Tribunals conducted the trials pursuant to Control Council Law No. 10 as well as Military Government Ordinance No. 7.[132] The Tribunals were bound by the determinations of the Nuremberg Tribunal "that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred". These determinations could not be questioned except to the extent that the knowledge thereof or the participation therein of a particular person was at issue in a subsequent proceeding. The statements of fact contained in the judgement of the Nuremberg Tribunal constituted proof of those facts unless there was substantial new evidence to the contrary.[133]

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[130] Article II provided as follows:

"1. Each of the following acts is recognized as a crime:

"(a) *Crimes against peace*; Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Ibid., p. XIX.

[131] Article II, paragraph 2, contained a general provision indicating the persons who could be held responsible for all of the crimes included within the jurisdiction of the Tribunals, namely, crimes against peace, war crimes and crimes against humanity, as well as a specific provision indicating the limited categories of persons who could incur responsibility for crimes against peace:

> "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article [crimes against peace, war crimes and crimes against humanity], if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) [crimes against peace], if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country." Idem.

[132] Military Government — Germany, United States Zone, Ordinance No. 7, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1951, vol. III, p. XXIII (hereinafter Ordinance No. 7).

[133] Art. X, ibid., p. XXVI.

125. Similarly, the French General Tribunal conducted the *Roechling* case involving charges of crimes against peace pursuant to Control Council Law No. 10 as well as Ordinances Nos. 20 and 36 of the French Supreme Commander in Germany providing for trials in the French Zone.[134]

C. Indictments

126. The United States Chief of Counsel for War Crimes was responsible for determining the persons to be tried by the United States Military Tribunals and filing the indictments against the accused.[135] Brigadier General Telford Taylor served as the Chief Prosecutor for the United States with respect to the Nuremberg Tribunal as well as the Chief of Counsel for the subsequent Tribunals.[136] The charges contained in the indictments in the four trials are discussed below.

127. Similarly, the prosecutor, Charles Gerthoffer, had previously served as one of the French prosecutors in the trial of major criminals before the Nuremberg Tribunal.[137] The charges contained in the indictment in this trial are also discussed below.

D. *United States of America* v. *Carl Krauch et al.* (the *I.G. Farben* case)

1. The charges of crimes against peace

128. The *I.G. Farben* case was one of the three cases brought by the United States against high-level officials of industry. Two of the industrialist cases, the *I.G. Farben* case and the *Krupp* case, involved charges of crimes against peace. In the present case, 24 individuals who were high-level officials of *I.G. Farben* (e.g., members of the Vorstand or the managing board) were charged with participating in planning, preparing, initiating and waging wars of aggression and invasions of other countries, namely, Austria, Czechoslovakia, Poland, the United Kingdom and France, Denmark and Norway, Belgium, the Netherlands and Luxembourg, Yugoslavia and Greece, the Soviet Union and the United States, under count one and participating in formulating and executing a common plan or conspiracy to commit such crimes against peace under count five. Each of the 23 defendants who stood trial entered a plea of not guilty. One defendant did not stand trial for reasons of ill-health.[138]

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[134] *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1949, vol. XIV, p.1061. The materials relating to the *Roechling* trial reproduced in this volume have been translated into English from the original French versions.

[135] Ordinance No. 7, art. III, ibid., vol. III, p. XXIV.

[136] Headquarters, United States Forces, European Theater, General Orders No. 301, 24 October 1946, ibid., vol. III, p. XXIII.

[137] Ibid., vol. XIV, p. 1061.

[138] The charges were filed against the following 24 defendants: Carl Krauch (Chairman of the Supervisory Board of Directors), Hermann Schmitz (Chairman of the Managing Board of Directors), Georg von Schnitzler (member of the Central Committee of the Managing Board of Directors), Fritz Gajewski (member of the Central Committee of the Managing Board of Directors), Heinrich Hoerlein (member of the Central Committee of the Managing Board of Directors), August von Knieriem (member of the Central Committee of the Managing Board of Directors), Fritz ter Meer (member of the Central Committee of the Managing Board of Directors), Christian Schneider (member of the Central Committee of the Managing Board of Directors), Otto Ambros (member of the Managing Board of Directors), Max Brueggemann (member and Secretary of the Managing Board of Directors), Ernst Buergin (member of the Managing Board of Directors), Heinrich Buetefisch (member of the Managing Board of Directors), Paul Haefliger (member of the Managing Board of Directors), Max Ilgner (member of the Managing Board of Directors), Friedrich Jaehne (member of the Managing Board of Directors), Hans Kuehne (member of the Managing Board of Directors), Carl Lautenschlaeger (member of the Managing Board of Directors), Wilhelm Mann (member of the Managing Board of Directors), Heinrich Oster (member of the Managing Board of Directors), Carl Wurster (member of the Managing Board of Directors), Walter Duerrfeld (Director and Construction Manager), Heinrich Gattineau (Chief of the Political-Economic Policy Department of I.G.Farben), Erich von der Heyde (member of the Political-Economic Policy Department) and Hans Kugler (member of the Commercial Committee of Farben). Brueggemann did not stand trial for reasons of ill-health. The accused also held various other positions including, inter alia, member of the Reichstag, Chief of chemical research and development of poison gas, Chief of production of poison gas, Chief of the Chemical Warfare Committee of the Ministry of Armaments and War Production, Director and Manager of the Auschwitz Plant and of the Monowitz Concentration Camp. Judgment, 29, 30 July 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1952, vol. VIII, pp. 1081, 1083.

2. Judgement

(a) The Nuremberg precedent: cautious approach requires conclusive evidence of knowledge and participation

129. The Tribunal considered counts one and five together since they were predicated on the same facts and involved the same evidence.[139] The Tribunal began by noting that the Nuremberg Tribunal (IMT) had exercised great caution in approaching the charges of crimes against peace and required conclusive evidence of knowledge and active participation for a conviction:

> "From the foregoing it appears that the IMT approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging aggressive war with great caution. It made findings of guilty under counts one and two only where the evidence of both knowledge and active participation was conclusive. No defendant was convicted under the charge of participating in the common plan or conspiracy unless he was, as was the defendant Hess, in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out, or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war."[140]

(b) The requirements for individual criminal responsibility

130. Turning to the present case, the Tribunal indicated that it must be shown that the defendants were parties to the plan or conspiracy or knew of the plan and furthered its purpose and objective by participating in preparing for aggressive war. The Tribunal indicated that such a determination required a consideration of the relevant facts, including the defendants' positions, authority, responsibility and activities. The Tribunal observed as follows:

> "If the defendants, or any of them, are to be held guilty under either count one or five or both on the ground that they participated in the planning, preparation, and initiation of wars of aggression or invasions, it must be shown that they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war. The solution of this problem requires a consideration of basic facts disclosed by the record. These facts include the positions, if any, held by the defendants with the State and their authority, responsibility and activities thereunder, as well as their positions and activities with or in behalf of Farben."[141]

(c) Knowledge

131. The Tribunal noted that the Nuremberg Tribunal had held that rearmament itself was not a crime. It concluded that the criminal responsibility of the accused in the present case would depend upon their knowledge of the aggressive plans. It observed:

> "The IMT stated that 'rearmament of itself is not criminal under the Charter'. It is equally obvious that participation in the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war. Thus we come to the question which is decisive of the guilt or innocence of the defendants under counts one and five — the question of knowledge."[142]

132. The Tribunal cautioned against viewing the conduct of the defendants with the benefit of hindsight in determining their knowledge:

> "... we have endeavoured to avoid the danger of viewing the conduct of the defendants wholly in retrospect. On the contrary, we have sought to determine their knowledge, their state of mind and their motives from the situation as it appeared, or should have appeared, to them at the time."[143]

(i) Common knowledge

133. The Tribunal concluded that there was no common knowledge in Germany that would have apprised the defendants of the existence or the ultimate purpose of Hitler's aggressive plans. The Tribunal noted Hitler's attempts to mislead the public, as indicated by the significant differences between his public statements

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[139] Ibid., p. 1096.

[140] Ibid., p. 1102.

[141] Ibid., p. 1108.

[142] Ibid., pp. 1112-1113.

[143] Ibid., p. 1108.

and the plans he disclosed at secret high-level meetings.[144] The Tribunal further observed:

> "While it is true that those with an insight into the evil machinations of power politics might have suspected Hitler was playing a cunning game of soothing restless Europe, the average citizen of Germany, be he professional man, farmer or industrialist, could scarcely be charged by these events with knowledge that the rulers of the Reich were planning to plunge Germany into a war of aggression.
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> "During this period, Hitler's subordinates occasionally gave expression to belligerent utterances. But even these can only by remote inference, formed in retrospect, be connected with a plan for aggressive war. The point here is the common or general knowledge of Hitler's plans and purpose to wage aggressive war. He was the dictator. It was natural that the people of Germany listened to and read his utterances in the belief that he spoke the truth.
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> "...
>
> "We reach the conclusion that common knowledge of Hitler's plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack individual countries, beginning with the invasion of Poland on 1 September 1939.
>
> "...
>
> "There was no such common knowledge in Germany that would apprise any of the defendants of the existence of Hitler's plans or ultimate purpose."[145]

(ii) Imputed personal knowledge

134. The Tribunal also concluded that *personal knowledge* could not be imputed to the defendants because they were not military experts, they did not know of the extent of the general rearmament plans and they did not know of the armament strength of the other States concerned:

> "It is contended that the defendants must have known from events transpiring within the Reich that what they did in aid of rearmament was preparing for aggressive war. It is asserted that the magnitude of the rearmament effort was such as to convey that knowledge. Germany was rearming so rapidly and to such an extent that, when viewed in retrospect in the light of subsequent events, armament production might be said to impute knowledge that it was in excess of the requirements of defence. If we were trying military experts, and it was shown that they had knowledge of the extent of rearmament, such a conclusion might be justified. None of the defendants, however, were military experts. They were not military men at all. The field of their life work had been entirely within industry, and mostly within the narrower field of the chemical industry with its attendant sales branches. The evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time. There is likewise no proof of their knowledge as to the armament strength of neighbouring nations. Effective armament is relative. Its efficacy depends upon the relative strength with respect to the armament of other nations against whom it may be used either offensively or defensively."[146]

(d) High-level position and degree of participation

135. The Tribunal noted that the present case involved men of industry who were not policy makers but nonetheless supported their Government during the rearmament and the aggressive war. In considering a reasonable standard for measuring the degree of participation necessary to constitute the crime of waging aggressive war, the Tribunal noted that the Nuremberg Tribunal had fixed a high standard of participation limited to those who led their country into war:

> "In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their Government during its period of rearmament and who continued to serve that Government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighbouring nation ... Of necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany's power to

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[144] Ibid., pp. 1102, 1106.

[145] Ibid., pp. 1106-1107, 1113.

[146] Ibid., p. 1113.

> resist, as well as to attack. Some reasonable standard must, therefore, be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war."[147]

136. The Tribunal expressed concern that lowering the standard of persons who could be held responsible for waging aggressive wars below persons in high-level positions in the political, military or industrial fields with responsibility for formulating and executing policies would create the risk of mass punishment:

> "To depart from the concept that only major war criminals — that is, those persons in the political, military and industrial fields, for example, who were responsible for the formulation and execution of policies — may be held liable for waging wars of aggression, would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments."[148]

137. The Tribunal noted that the accused in the present case were not high-level government or military officials and participated as followers rather than leaders. It questioned where to draw the line among the guilty and the innocent of the German civilian population and expressed concern about the risk of collective guilt and mass punishment. It also expressed concern about imposing an unreasonable burden on a private citizen to question his Government and decide whether its policies amounted to aggression. The Tribunal observed:

> "The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his Government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland and the defence of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression."[149]

138. The Tribunal concluded that criminal responsibility for waging aggressive war should be limited to the individuals who plan and lead a nation in initiating and conducting an aggressive war and should not extend to their followers, whose participation in aiding the war effort is the same as any productive industry. The Tribunal therefore concluded that the standard fixed in the trial of major criminals before the Nuremberg Tribunal should not be changed:

> "Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent. Lest it be said that the difficulty of the task alone should not deter us from its performance, if justice should so require, here let it be said that the mark has already been set by that Honourable Tribunal in the trial of the international criminals. It was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick,

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[147] Ibid., pp. 1125-1126.

[148] Ibid., pp. 1124-1125.

[149] Ibid., p. 1126.

and the plans he disclosed at secret high-level meetings.[144] The Tribunal further observed:

> "While it is true that those with an insight into the evil machinations of power politics might have suspected Hitler was playing a cunning game of soothing restless Europe, the average citizen of Germany, be he professional man, farmer or industrialist, could scarcely be charged by these events with knowledge that the rulers of the Reich were planning to plunge Germany into a war of aggression.
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> "During this period, Hitler's subordinates occasionally gave expression to belligerent utterances. But even these can only by remote inference, formed in retrospect, be connected with a plan for aggressive war. The point here is the common or general knowledge of Hitler's plans and purpose to wage aggressive war. He was the dictator. It was natural that the people of Germany listened to and read his utterances in the belief that he spoke the truth.
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> "There was no such common knowledge in Germany that would apprise any of the defendants of the existence of Hitler's plans or ultimate purpose."[145]

(ii) Imputed personal knowledge

134. The Tribunal also concluded that *personal knowledge* could not be imputed to the defendants because they were not military experts, they did not know of the extent of the general rearmament plans and they did not know of the armament strength of the other States concerned:

> "It is contended that the defendants must have known from events transpiring within the Reich that what they did in aid of rearmament was preparing for aggressive war. It is asserted that the magnitude of the rearmament effort was such as to convey that knowledge. Germany was rearming so rapidly and to such an extent that, when viewed in retrospect in the light of subsequent events, armament production might be said to impute knowledge that it was in excess of the requirements of defence. If we were trying military experts, and it was shown that they had knowledge of the extent of rearmament, such a conclusion might be justified. None of the defendants, however, were military experts. They were not military men at all. The field of their life work had been entirely within industry, and mostly within the narrower field of the chemical industry with its attendant sales branches. The evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time. There is likewise no proof of their knowledge as to the armament strength of neighbouring nations. Effective armament is relative. Its efficacy depends upon the relative strength with respect to the armament of other nations against whom it may be used either offensively or defensively."[146]

(d) High-level position and degree of participation

135. The Tribunal noted that the present case involved men of industry who were not policy makers but nonetheless supported their Government during the rearmament and the aggressive war. In considering a reasonable standard for measuring the degree of participation necessary to constitute the crime of waging aggressive war, the Tribunal noted that the Nuremberg Tribunal had fixed a high standard of participation limited to those who led their country into war:

> "In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their Government during its period of rearmament and who continued to serve that Government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighbouring nation ... Of necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany's power to

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[144] Ibid., pp. 1102, 1106.

[145] Ibid., pp. 1106-1107, 1113.

[146] Ibid., p. 1113.

> resist, as well as to attack. Some reasonable standard must, therefore, be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war."[147]

136. The Tribunal expressed concern that lowering the standard of persons who could be held responsible for waging aggressive wars below persons in high-level positions in the political, military or industrial fields with responsibility for formulating and executing policies would create the risk of mass punishment:

> "To depart from the concept that only major war criminals — that is, those persons in the political, military and industrial fields, for example, who were responsible for the formulation and execution of policies — may be held liable for waging wars of aggression, would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments."[148]

137. The Tribunal noted that the accused in the present case were not high-level government or military officials and participated as followers rather than leaders. It questioned where to draw the line among the guilty and the innocent of the German civilian population and expressed concern about the risk of collective guilt and mass punishment. It also expressed concern about imposing an unreasonable burden on a private citizen to question his Government and decide whether its policies amounted to aggression. The Tribunal observed:

> "The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his Government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland and the defence of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression."[149]

138. The Tribunal concluded that criminal responsibility for waging aggressive war should be limited to the individuals who plan and lead a nation in initiating and conducting an aggressive war and should not extend to their followers, whose participation in aiding the war effort is the same as any productive industry. The Tribunal therefore concluded that the standard fixed in the trial of major criminals before the Nuremberg Tribunal should not be changed:

> "Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent. Lest it be said that the difficulty of the task alone should not deter us from its performance, if justice should so require, here let it be said that the mark has already been set by that Honourable Tribunal in the trial of the international criminals. It was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick,

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[147] Ibid., pp. 1125-1126.

[148] Ibid., pp. 1124-1125.

[149] Ibid., p. 1126.

> Funk, Dönitz, Raeder, Jodl, Seyss-Inquart and von Neurath, who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions. To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, 'were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.'"[150]

(c) Conclusion

139. The Tribunal first considered the criminal responsibility of the four defendants who held the highest positions, namely Krauch, Schmitz, von Schnitzler and ter Meer. The Tribunal concluded that although they had clearly participated in the rearmament of Germany, there was insufficient evidence that they did so with knowledge of Hitler's aggressive plans:

> "In each instance we find that they, in more or less important degrees, participated in the rearmament of Germany by contributing to her economic strength and the production of certain basic materials of great importance in the waging of war. The evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war or wars that had already been planned either generally or specifically by Adolf Hitler and his immediate circle of Nazi civil and military fanatics."[151]

140. The Tribunal decided that it was unnecessary to determine the knowledge of the other 19 defendants who held subordinate positions of lesser importance in less extensive fields of operation:

> "The remaining defendants, consisting of 15 former members and 4 non-members of the Vorstand, occupied positions of lesser importance than the defendants we have mentioned. Their respective fields of operation were less extensive and their authority of a more subordinate nature. The evidence against them with respect to aggressive war is weaker than that against those of the defendants to whom we have given special consideration. No good purpose would be served by undertaking a discussion in this judgement of each specific defendant with respect to his knowledge of Hitler's aggressive aims."[152]

141. The Tribunal therefore acquitted all 23 defendants of count one and also of count five for the following reasons:

> "Count five charges that the acts and conduct of the defendants set forth in count one and all of the allegations made in count one are incorporated in count five. Since we have already reached the conclusion that none of the defendants participated in the planning or knowingly participated in the preparation and initiation or waging of a war or wars of aggression or invasions of other countries, it follows that they are not guilty of the charge of being parties to a common plan or conspiracy to do these same things."[153]

E. *United States of America* v. *Alfried Felix Alwyn Krupp von Bohlen und Halbach, et al.* (the *Krupp* case)

1. The charges of crimes against peace

142. The *Krupp* case was the last of the three industrialist cases to be decided by the United States Military Tribunals at Nuremberg, with judgement being rendered in this case the day after sentencing in the *I. G. Farben* case. The *Krupp* case involved the trial of 12 officials of the Krupp firm who held high-level positions in management (e.g., members of the Managing Board) or other important official positions in the business.[154] All of the accused were charged with

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[150] Ibid., pp. 1126-1127.

[151] Ibid., p. 1123.

[152] Ibid., p. 1124.

[153] Ibid., p. 1128.

[154] Gustav Krupp von Bohlen und Holbach, the father of Alfried Krupp, was the head of the Krupp firm until 1943. He was charged, inter alia, with crimes against peace in the indictment of major criminals submitted to the Nuremberg Tribunal. However, he did not stand trial for reasons of mental and physical incapacity. He was

committing crimes against peace under count one and participating in a common plan or conspiracy to commit such crimes under count four. Each of the defendants entered a plea of not guilty.[155]

2. The motion for dismissal

143. At the conclusion of the presentation of the case for the prosecution, the defence made a motion to dismiss the charges based on insufficient evidence.

(a) The Nuremberg precedent

(i) The aggressive wars

144. The Tribunal noted that it was bound by the determinations of the Nuremberg Tribunal concerning the invasions and aggressive wars under article X of Military Ordinance No. 7.[156] The Tribunal recognized that the wars that the accused were alleged to have participated in initiating were clearly aggressive.

(ii) Knowledge

145. Turning to the Nuremberg Tribunal judgement for guidance, the Tribunal observed that "the International Military Tribunal required proof that each defendant had actual knowledge of the plans for at least one of the invasions or wars of aggression, in order to find him guilty".[157] It questioned whether the accused had acted with the knowledge that "they were participating in, taking a consenting part in, aiding and abetting the invasions and wars".[158]

146. In reaching its decision in the present case, the Tribunal was guided by the verdicts of the Nuremberg Tribunal with respect to Hess, Schacht and Speer. The Tribunal noted that Hess had been convicted of the counts relating to conspiracy and aggressive war even though he had not attended any of the four high-level meetings at which Hitler had disclosed his aggressive plans. The Tribunal similarly held that an accused could be found guilty of such crimes even though he had not attended one of those meetings.

(iii) Rearmament as a form of participation in the crime of aggression

147. The Tribunal noted that Schacht was acquitted of those counts based on the Nuremberg Tribunal's finding that rearmament itself was not criminal unless it was carried out as part of the plans to wage aggressive wars. The Tribunal also noted that Speer had been acquitted of those counts because his activities did not constitute initiating, planning or preparing aggressive war or conspiring to do so since he became head of the armament industry after the wars had begun and his activities in charge of armament production aided the war effort in the same way as other productive industries. The Tribunal concluded that if Speer's activities did not constitute waging aggressive war, then the accused in the present case could certainly not be found guilty of that crime.[159]

(b) Conclusion

148. The Tribunal granted the defence motion to dismiss the charges based on insufficient evidence.[160] However, the Tribunal emphasized that its decision should not be interpreted as excluding the possibility that high-level industrialists could be held responsible for crimes against peace, but rather that there was insufficient evidence of the responsibility of the accused for such crimes in the present case. The Tribunal stated: "We do not hold that industrialists, as such, could not under any circumstances be found guilty upon such charges."[161]

F. *United States of America* v. *Wilhelm von Leeb et al.* (the *High Command* case)

1. The charges of crimes against peace

149. Fourteen officers who held high-level positions in the German military were charged in this case with crimes against peace (count one) and conspiracy to

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not included as an accused in the subsequent proceeding for the same reason. *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1950, vol. IX, p. 1.

[155] Judgment, 31 July 1948, ibid., p. 1327.

[156] Ibid., p. 392.

[157] Ibid., pp. 392, 396.

[158] Ibid., p. 396.

[159] Ibid., pp. 396-398. The tribunal also rejected the argument that there were two or more separate conspiracies to achieve the same goal, namely, the Nazi conspiracy and the Krupp conspiracy.

[160] Order of the Tribunal Acquitting the Defendants of the Charges of Crimes Against Peace and Opinion of the Tribunal Concerning Its Dismissal of the Charges of Crimes Against Peace, 11 June 1948, ibid., pp. 390-391, 400.

[161] Ibid., p. 393.

commit such crimes (count four).[162] More specifically, under count one all of the accused were charged with participating in initiating aggressive invasions and planning, preparing and waging aggressive wars against Austria, Czechoslovakia, Poland, the United Kingdom, France, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States. Under count four all of the accused were charged with participating in a common plan or conspiracy to commit crimes against peace as well as war crimes and crimes against humanity that were committed as an integral part of the crimes against peace. Each of the accused entered a plea of not guilty.[163] The Tribunal struck the conspiracy charges contained in count four without further consideration after finding that it included no separate substantive offence under the facts of the case and raised no issue not contained in the other counts.[164]

2. Judgement

(a) The nature and characteristics of aggressive wars and invasions

150. Turning to the charges of crimes against peace under count one, the Tribunal began by considering the nature and characteristics of war, which it described as "the implementation of a political policy by means of violence". The Tribunal emphasized that the essential characteristic of war activity is "the implementation of a predetermined national policy". The Tribunal observed:

> "Before seeking to determine the law applicable it is necessary to determine with certainty the action which the defendants are alleged to have taken that constitutes the crime. As a preliminary to that, we deem it necessary to give a brief consideration to the nature and characteristics of war. We need not attempt a definition that is all-inclusive and all-exclusive. It is sufficient to say that war is the exerting of violence by one State or politically organized body against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units, but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to an unjust war, to the initiation of an aggressive and, therefore, criminal war as to the waging of a defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy."[165]

151. The Tribunal then considered the nature and characteristics of an invasion. It similarly emphasized that the essential characteristic of an invasion was the implementation of a national policy. It concluded that resistance to the invasion resulting in actual combat was not a necessary requirement for an invasion. The Tribunal observed:

> "Likewise, an invasion of one State by another is the implementation of the national policy of the invading State by force even though the invaded State, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat."[166]

152. Having noted the similar characteristics of an unlawful aggressive war and a lawful defensive war, the Tribunal indicated that the lawful or unlawful character of a war depended on the factors that determined its initiation, namely, the intent and purpose of the activity:

> "The initiation of war or an invasion is a unilateral operation. When war is formally

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[162] The following members of the German military were charged with crimes against peace: Generalfeldmarschall (General of the Army) Wilhelm von Leeb, Generalfeldmarschall (General of the Army) Hugo Sperrle, Generalfeldmarschall (General of the Army) Georg Karl Friedrich-Wilhelm von Kuechler, Generaloberst (General) Johannes Blaskowitz, Generaloberst (General) Hermann Hoth, Generaloberst (General) Hans Reinhardt, Generaloberst (General) Hans von Salmuth, Generaloberst (General) Karl Hollidt, Generaladmiral (Admiral) Otto Schniewind, General der Infanterie (Lieutenant General Infantry) Karl von Roques, General der Infanterie (Lieutenant General, Infantry) Hermann Reinecke, General der Artillerie (Lieutenant General, Artillery) Walter Warlimont, General der Infanterie (Lieutenant General, Infantry) Otto Woehler and Generaloberstabsrichter (Lieutenant General, Judge Advocate) Rudolf Lehmann. The charges against Blaskowitz were terminated after he committed suicide in prison on 5 February 1948. Judgement, 27, 28 October 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1950, vol. XI, pp. 462-463.

[163] Ibid., p. 462.

[164] Judgement, 27, 28 October 1948, ibid., pp. 482-483.

[165] Ibid., p. 485.

[166] Ibid.

> declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries. Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness."[167]

153. In terms of the unlawful character of an aggressive war, the Tribunal considered the Kellogg-Briand Pact, in which war was renounced as an instrument of national policy. The Tribunal noted that "the nations that entered into the Kellogg-Briand Pact considered it imperative that existing international relationships should not be changed by force". In that regard, the Tribunal referred to the preamble to the Pact, in which the signatory nations stated that they were "persuaded that the time has come when ... all changes in their relationships with one another should be sought only by pacific means". As a result of the Pact, the Tribunal considered the nature of an act of aggression or aggressive war as follows:

> "This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of international law, free from all interference by force on the part of any other nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the Pact. It is aggressive war that is criminal under international law."[168]

154. The Tribunal emphasized that a State may use armed force to defend itself against aggression and may arm itself in order to be able to do as long as there is no aggressive intent or purpose.

> "Furthermore, we must not confuse idealistic objectives with realities. The world has not arrived at a state of civilization such that it can dispense with fleets, armies and air forces, nor has it arrived at a point where it can safely outlaw war under any and all circumstances and situations. In as much as all war cannot be considered outlawed, then armed forces are lawful instrumentalities of State, which have internationally legitimate functions. An unlawful war of aggression connotes of necessity a lawful war of defence against aggression. There is no general criterion under international common law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. An example is Switzerland, which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world. She uses her military strength to implement a national policy that seeks peace and to maintain her borders against aggression."[169]

155. The Tribunal noted that if war was initiated to implement a national policy with a criminal intent and purpose, then the waging of the war in implementation of that policy was also criminal. It concluded that because of the essential policy element which was inherent in initiating and waging war, only those who participated at the policy level should be held criminally responsible:

> "As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose, it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained, then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level."[170]

(b) The elements required for individual criminal responsibility

156. The Tribunal then considered the question of individual responsibility for the crime of initiating or waging an aggressive war. It identified three essential elements for a person to be held responsible for aggressive war, namely: the person must have actual knowledge of the intention to initiate an aggressive war

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[167] Ibid., p. 486.

[168] Ibid., p. 490.

[169] Ibid., pp. 487-488.

[170] Ibid., p. 486.

and of its aggressive character; the person must be in a position to shape or influence the policy of initiating or continuing the aggressive war; and the person must use this position to further such a policy:

> "We are of the opinion that, as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy."[171]

(i) Knowledge

157. The Tribunal noted that a person could acquire the necessary actual knowledge of concrete plans and preparations for invasion and aggressive war either before or after the formulation of the policy to initiate and wage such a war:

> "If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so."[172]

(ii) High-level policy position

158. The Tribunal noted that national policy was made by individuals and that those who made a criminal national policy incurred criminal responsibility — in contrast to those who operated below the policy level in carrying out the criminal policies.

> "It is self-evident that national policies are made by man. When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion.
>
> "The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal."[173]

159. The Tribunal indicated that the top policy maker was not the only person who could be held responsible for aggression but rather that the line was to be drawn somewhere between the senior officials and the common soldier:

> "This does not mean that the Tribunal subscribes to the contention made in this trial that since Hitler was the Dictator of the Third Reich and that he was supreme in both the civil and military fields, he alone must bear criminal responsibility for political and military policies. No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning and waging such war. Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No. 10 does not definitely draw such a line."[174]

160. Although occupying a high-level position is an important indication of a person's ability to influence or shape a national policy of war, the Tribunal emphasized that a person should not be convicted or relieved of criminal responsibility for aggression simply by reason of such a position:

> "The prosecution does not seek, or contend that the law authorizes, a conviction of the

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[171] Ibid., p. 488.

[172] Ibid., pp. 488-489.

[173] Ibid., pp. 490-491.

[174] Ibid., p. 486.

> defendants simply by reason of their positions as shown by the evidence, but it contends only that such positions may be considered by the Tribunal with all other evidence in the case for such light as they may shed on the personal guilt or innocence of the individual defendants. The prosecution does contend, and we think the contention sound, that the defendants are not relieved of responsibility for action which would be criminal in one who held no military position, simply by reason of their military positions. This is the clear holding of the judgement of the IMT, and is so provided in Control Council Law No. 10, article II, paragraph 4 (a)."[175]

161. The Tribunal also emphasized that it was not simply a question of a person's position, rank or status, but rather the power to shape or influence national policy:

> "If and as long as a member of the armed forces does not participate in the preparation, planning, initiating or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace."[176]

162. The Tribunal noted that a person might shape or influence a national policy of war with respect to political or military matters:

> "The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political."[177]

(iii) Participation

163. The Tribunal indicated that only persons on the policy level who had the actual power to shape and influence national policy and who also participated in the aggressive policy by preparing for or leading their country into or in an aggressive war could be held responsible, in contrast to persons on the lower level who acted as instruments of the policy makers in executing the aggressive policy:

> "International law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization."[178]

164. The Tribunal noted that a person could incur criminal responsibility by participating on the policy-making level at various stages, including planning, preparing or initiating a war as well as extending or continuing a war:

> "The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy-making level in planning, preparing or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy-making level."[179]

(c) Conclusion

165. The Tribunal acquitted all of the accused of the charges of crimes against peace after finding that they "were not on the policy level".[180]

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[175] Ibid.

[176] Ibid., p. 489.

[177] Ibid., p. 490.

[178] Ibid., p. 489.

[179] Ibid., p. 490.

[180] Ibid., p. 491.

G. *United States of America* v. *Ernst von Weizsäcker et al.* (the *Ministries* case)

1. The charges of crimes against peace

166. In the *Ministries* case, 21 persons who were high-level officials in the Government or the Nazi Party were charged with crimes against peace, war crimes and crimes against humanity. Of the 21 defendants, 17 were charged with planning, preparing, initiating and waging wars of aggression and invasions of other countries under count one and participating in a common plan or conspiracy to commit such crimes under count two. More specifically, the defendants were charged with aggressive invasions and wars against the following countries initiated on the dates indicated: Austria: 12 March 1938; Czechoslovakia: 1 October 1938 and 15 March 1939; Poland: 1 September 1939; the United Kingdom and France: 3 September 1939; Denmark and Norway: 9 April 1940; Belgium, the Netherlands and Luxembourg: 10 May 1940; Yugoslavia and Greece: 6 April 1941; the Soviet Union: 22 June 1941; and the United States: 11 December 1941. In response to a motion by the prosecution, the Tribunal dismissed the charges against three of the defendants under counts one and two. All of the accused pleaded not guilty to the charges.[181]

2. Judgement

167. The Tribunal initially convicted five and acquitted nine of the 14 defendants who were tried for charges relating to crimes against peace. Shortly before rendering its judgement, the Tribunal on its own motion issued two orders permitting any defendant whose interests were affected to file a memorandum with the Tribunal calling its attention to any alleged errors of fact or law, together with citations to the record of facts and authorities of law relied upon.[182] The Tribunal noted the unusually long record of the case and the multiplicity of legal and factual issues. All five of the defendants who were convicted of crimes against peace filed such memoranda. The Tribunal reversed two of the convictions and affirmed the other three.

(a) The law relating to aggressive wars and invasions

168. The Tribunal considered the law relating to aggressive wars and invasions and concluded that such acts had been prohibited by international law since time immemorial:

> "The question, therefore, is whether or not the London Charter and Control Council Law No. 10 define new offences or whether they are but definitive statements of pre-existing international

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[181] The names of the 21 high-level officials who were charged in this case follow, with the names of the 17 defendants charged with crimes against peace appearing in italics and the 3 defendants against whom those charges were dismissed also appearing in bold: *Ernst von Weizsacker* (State Secretary of the German Foreign Office from 1938 to 1943); Gustav Adolf Steengracht von Moyland (State Secretary of the German Foreign Office from 1943 to 1945); *Wilhelm Keppler* (State Secretary for Special Assignments in the German Foreign Office from 1938 to 1945); ***Ernst Wilhelm Bohle*** (State Secretary and Chief of the Foreign Organization in the German Foreign Office from 1937 to 1941); *Ernst Wörmann* (Ministerial Director and Chief of the Political Division of the German Foreign Office from 1938 to 1943); *Karl Ritter* (Ambassador for Special Assignments in the German Foreign Office from 1939 to 1945); ***Otto von Erdmannsdorff*** (Ministerial Dirigent and Deputy to the Chief of the Political Division of the German Foreign Office from 1941 to 1943 (1945)); *Edmund Veesenmayer* (German Minister and Plenipotentiary of the Reich in Hungary from 1944 to 1945); *Hans Heinrich Lammers* (Reich Minister and Chief of the Reich Chancellery from 1937 to 1945); *Wilhelm Stuckart* (State Secretary in the Reich Ministry of the Interior from 1935 to 1945); *Richard Walther Darré* (Reich Minister for Food and Agriculture from 1933 to 1945); ***Otto Meissner*** (Chief of the Presidential Chancellery from 1934 to 1945); *Otto Dietrich* (State Secretary in the Reich Ministry of Public Enlightenment and Propaganda from 1937 to 1945); *Gottlob Berger* (Lieutenant General of the SS); *Walter Schellenberg* (Brigadier General of the SS, Chief of the combined civil and military intelligence service from 1944 to 1945); *Lutz Schwerin von Krosigk* (Reich Minister of Finance from 1932 to 1945); Emil Puhl (member of the Board of Directors of the Reichsbank from 1935 to 1945); Karl Rasche (member, and later speaker, of the Vorstand of the Dresdner Bank from 1935 to 1945); *Paul Koerner* (Permanent Deputy of Göring as Plenipotentiary for the Four Year Plan); *Paul Pleiger* (Chairman of the Reich Coal Association from 1941 to 1945); and Hans Kehrl (Chief of the Planning Office of the Reich Ministry for Armament and War Production from 1943 to 1945). For a complete list of the positions held by the accused at various times, see Indictment, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, [no publication date given], vol. XII, pp. 13, 14-20. See also Judgement, 11-13 April 1949, ibid., vol. XIV, pp. 308, 314, 323, 435.

[182] Orders permitting the filing of memoranda concerning alleged errors, 6 and 14 April 1949, ibid., pp. 943, 944.

law. That monarchs and States, at least those who considered themselves civilized, have for centuries recognized that aggressive wars and invasions violated the law of nations is evident from the fact that invariably he who started his troops on the march or his fleets over the seas to wage war has endeavoured to explain and justify the act by asserting that there was no desire or intent to infringe upon the lawful rights of the attacked nation or to engage in cold-blooded conquest, but on the contrary that the hostile acts became necessary because of the enemy's disregard of its obligations; that it had violated treaties; that it held provinces or cities which in fact belonged to the attacker; or that it had mistreated or discriminated against his peaceful citizens.

"Often these justifications and excuses were offered with cynical disregard of the truth. Nevertheless, it was felt necessary that an excuse and justification be offered for the attack to the end the attacker might not be regarded by other nations as acting in wanton disregard of international duty and responsibility ...

"But if the aggressive invasions and wars were lawful and did not constitute a breach of international law and duty, why take the trouble to explain and justify? Why inform neutral nations that the war was inevitable and excusable and based on high notions of morality, if aggressive war was not essentially wrong and a breach of international law? The answer to this is obvious. The initiation of wars and invasions with their attendant horror and suffering has for centuries been universally recognized by all civilized nations as wrong, to be resorted to only as a last resort to remedy wrongs already or imminently to be inflicted. We hold that aggressive wars and invasions have, since time immemorial, been a violation of international law, even though specific sanctions were not provided.

"The Kellogg-Briand Pact not only recognized that aggressive wars and invasions were in violation of international law, but proceeded to take the next step, namely, to condemn recourse to war (otherwise justifiable for the solution of international controversies), to renounce it as an instrumentality of national policy and to provide for the settlement of all disputes or conflicts by pacific means. Thus war as a means of enforcing lawful claims and demands became unlawful. The right of self-defence, of course, was naturally preserved, but only because if resistance was not immediately offered, a nation would be overrun and conquered before it could obtain the judgement of any international authority that it was justified in resisting attack."[183]

(b) The question of individual criminal responsibility for aggressive wars and invasions

169. The Tribunal then considered the question of the criminal responsibility of the individuals who planned, prepared, initiated and waged aggressive wars and invasions and concluded that such individuals as well as those who knowingly, consciously and responsibly participated therein were subject to trial and punishment for their conduct for the following reasons:

> "Is there personal responsibility for those who plan, prepare and initiate aggressive wars and invasions? The defendants have ably and earnestly urged that heads of States and officials thereof cannot be held personally responsible for initiating or waging aggressive wars and invasions because no penalty had been previously prescribed for such acts. History, however, reveals that this view is fallacious. Frederick the Great was summoned by the Imperial Council to appear at Regensburg and answer, under threat of banishment, for his alleged breach of the public peace in invading Saxony.
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> "When Napoleon, in alleged violation of his international agreement, sailed from Elba to regain by force the Imperial Crown of France, the nations of Europe, including many German princes in solemn conclave, denounced him, outlawing him as an enemy and disturber of the peace, mustered their armies, and on the batterfield of Waterloo, enforced their decree, and applied the sentence of banishing him to St. Helena. By these actions they recognized and declared that personal punishment could be properly inflicted upon a head of State who violated an international agreement and resorted to aggressive war.
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> "But even if history furnished no examples, we would have no hesitation in holding that those who prepare, plan or initiate aggressive invasions,

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[183] Judgement, ibid., pp. 318-319.

and wage aggressive wars; and those who knowingly participate therein are subject to trial, and if convicted, to punishment.

"By the Kellogg-Briand Treaty, Germany, as well as practically every other civilized country of the world, renounced war as an instrumentality of governmental policy. The treaty was entered into for the benefit of all. It recognized the fact that once war breaks out, no one can foresee how far or to what extent the flames will spread, and that in this rapidly shrinking world it affects the interests of all.

"No one would question the right of any signatory to use its armed forces to halt the violator in his tracks and to rescue the country attacked. Nor would there be any question but that when this was successfully accomplished sanctions could be applied against the guilty nation. Why then can they not be applied to the individuals by whose decisions, cooperation and implementation the unlawful war or invasion was initiated and waged? Must the punishment always fall on those who were not personally responsible? May the humble citizen who knew nothing of the reasons for his country's actions, who may have been utterly deceived by its propaganda, be subject to death or wounds in battle, held as a prisoner of war, see his home destroyed by artillery or from the air, be compelled to see his wife and family suffer privations and hardships; may the owners and workers in industry see it destroyed, their merchant fleets sunk, the mariners drowned or interned; may indemnities result which must be derived from the taxes paid by the ignorant and the innocent; may all this occur and those who were actually responsible escape?

"The only rationale which would sustain the concept that the responsible shall escape while the innocent public suffers, is a result of the old theory that 'the King can do no wrong,' and that 'war is the sport of Kings'.

"We may point out further that the [Hague and] Geneva Conventions relating to the rules of land warfare and the treatment of prisoners of war provide no punishment for the individuals who violate those rules, but it cannot be questioned that he who murders a prisoner of war is liable to punishment.

"To permit such immunity is to shroud international law in a mist of unreality. We reject it and hold that those who plan, prepare, initiate and wage aggressive wars and invasions, and those who knowingly, consciously and responsibly participate therein violate international law and may be tried, convicted and punished for their acts."[184]

(c) The *tu quoque* doctrine

170. The Tribunal next rejected the defence assertion of the *tu quoque* doctrine based on the alleged complicity of the Soviet Union in Hitler's invasion of Poland as invalidating the London Charter and Control Council Law No. 10. The Tribunal held that those instruments would not be invalid even if the allegations were true, for the following reasons:

> "Neither the London Charter nor Control Council Law No. 10 did more than declare existing international law regarding aggressive wars and invasions. The Charter and Control Council Law No. 10 merely defined what offences against international law should be the subject of judicial inquiry, formed the International Military Tribunal and authorized the signatory powers to set up additional tribunals to try those charged with committing crimes against peace, war crimes and crimes against humanity.
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> "But even if it were true that the London Charter and Control Council Law No. 10 are legislative acts, making that a crime which before was not so recognized, would the defence argument be valid? It has never been suggested that a law duly passed becomes ineffective when it transpires that one of the legislators whose vote enacted it was himself guilty of the same practice or that he himself intended, in the future, to violate the law."[185]

(d) The alleged acts of aggression

171. Before turning to the alleged acts of aggression, the Tribunal noted that "the evidence of this case presents a factual story of practically every phase of activity of the Nazi Party and of the Third Reich, whether political, economic, industrial, financial or military."[186] The Tribunal also noted that the evidence included hundreds of captured official documents that were not available at the time of the trial before the Nuremberg Tribunal and were not offered in other trials

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[184] Ibid., pp. 321-322.

[185] Ibid., pp. 322-323.

[186] Ibid., p. 316.

before United States Military Tribunals. The Tribunal concluded that "the record here presents, more fully and completely than in any other case, the story of the rise of the Nazi regime, its programmes and its acts."[187] While recognizing that it was bound by the determinations of the Nuremberg Tribunal concerning the planning or occurrence of invasions, aggressive acts and aggressive wars pursuant to article X of Military Ordinance No. 7, the Tribunal permitted the defence to offer evidence on these matters because it was "firmly convinced that courts of justice must always remain open to the ascertainment of the truth and that every defendant must be accorded an opportunity to present the facts."[188]

(i) The claim that Germany acted in self-defence and the alleged invalidity of the Treaty of Versailles

172. Notwithstanding the determination of the Nuremberg Tribunal and of the United States Military Tribunals that these invasions and wars were aggressive and therefore unlawful, the present Tribunal decided to re-examine the question in response to the defence claim that newly discovered evidence revealed that Germany was not the aggressor.[189] The defence argued that Germany could not be judged an aggressor because of the alleged injustices and harsh terms of the Treaty of Versailles, which were imposed upon Germany by force; such an agreement made under duress was not binding; and Germany had been compelled to use force to rid itself of those bonds imposed upon it.[190]

173. The Tribunal concluded that it was not necessary to review the validity of the Treaty of Versailles because the defence claim lacked sufficient legal merit. The Tribunal concluded that there was "no substance to the defence, irrespective of the question of whether the treaty was just or whether it was imposed by duress".[191] The Tribunal reached this conclusion based on its finding that the invasions and wars violated other international agreements and official assurances freely entered into by Germany. The Tribunal observed:

> "We deem it unnecessary to determine either the truth of these claims or whether one upon whom the victor by force of arms has imposed a treaty on unjust or unduly harsh terms may therefore reject the treaty and, by force of arms, attempt to regain that which it believes has been wrongfully wrested from it.
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> "If, *arguendo*, both propositions were conceded, nevertheless, both are irrelevant to the question confronting us here. In any event the time must arrive when a given status, irrespective of the means whereby it came into being, must be considered as fixed, at least so far as a resort to an aggressive means of correction is concerned.
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> "When Hitler solemnly informed the world that so far as territorial questions were concerned Germany had no claims, and by means of solemn treaty assured Austria, France, Czechoslovakia and Poland that he had no territorial demands to be made upon them, and when he entered into treaties of peace and non-aggression with them, the status of repose and fixation was reached. These assurances were given and these treaties entered into when there could be no claim of existing compulsion. Thereafter aggressive acts against the territories of these nations became breaches of international law, prohibited by the provisions of the Kellogg-Briand Treaty to which Germany had become a voluntary signatory.
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> "No German could thereafter look upon war or invasion to recover part or all of the territories of which Germany had been deprived by the Treaty of Versailles as other than aggressive. To excuse aggressive acts after these treaties and assurances took place is merely to assert that no treaty and no assurance by Germany is binding and that the pledged word of Germany is valueless."[192]

174. The Tribunal reviewed the specific treaties, solemn assurances and official declarations by Germany in relation to the countries that were the alleged victims of aggression:

(a) Czechoslovakia: the 1925 German-Czech Arbitration Convention concluded at Locarno, the 1929 German-Czech treaty providing for the peaceful settlement of disputes, and the 1938 assurances given by high-level German officials that Germany's actions with respect to Austria would not detrimentally affect and would tend to improve German-Czech relations;

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[187] Ibid.

[188] Ibid., p. 317.

[189] One of the defendants, von Weiszäcker, admitted the aggressive character of these acts. Ibid., p. 323.

[190] Ibid., p. 324.

[191] Ibid.

[192] Ibid.

(b) Austria: the 1935 assurance by Germany that it would not intervene in the domestic affairs of Austria or annex or attach Austria to Germany, and the 1936 German-Austrian agreement recognizing the full sovereignty of Austria;

(c) Poland: the 1925 German-Polish treaty providing for the peaceful settlement of disputes concluded at Locarno, the 1934 non-aggression pact between Germany and Poland, Hitler's 1936 announcement that Germany had no territorial demands to make in Europe, Hitler's 1938 speeches indicating friendly and peaceful relations between Germany and Poland, and, conversely, the 1938 preparations for Germany's occupation of the Free City of Danzig by surprise;

(d) Denmark and Norway: the 1939 German-Danish non-aggression pact, the defendant von Weizsäcker's 1939 assurance that Germany would abide by this pact, Germany's 1939 assurance of friendly relations with Norway and respect for its inviolability and neutrality, and Germany's 1939 assurance that it had no conflicts of interest or controversy with the Northern States;

(e) Belgium: Hitler's 1937 and 1939 assurances that Germany was prepared to recognize and guarantee the inviolability of Belgium and the Netherlands and, conversely, the German Army's planning and preparations in 1939 to invade those countries pursuant to Hitler's orders;

(f) Yugoslavia: the defendant von Weizsäcker's 1938 assurances that, having reunited with Austria, Germany considered the frontiers of Yugoslavia as inviolable, that German policy had no aims beyond Austria and that Yugoslavia's frontier would not be assaulted; Hitler's 1939 assurance that Yugoslavia's boundaries were inviolable and that Germany desired friendly, peaceful relations with it; and, conversely, Hitler's suggestion in 1939 that Italy should liquidate Yugoslavia as an "uncertain neutral";

(g) Soviet Union: the 1939 German-Russian non-aggression pact, the 1939 German-Soviet boundary and friendship agreement fixing their mutual boundaries and dividing Poland between them, and, conversely, German preparations as early as 1940 for attacking the Soviet Union.[193]

175. The Tribunal emphasized the duplicitous conduct[194] of Hitler's regime in negotiating and entering into these agreements and giving these solemn assurances which it never intended to comply with since it was already engaged in planning and preparing aggressive acts in violation thereof:

> "The evidence establishes beyond all question or doubt that Germany, under Hitler, never made a promise which it intended to keep, that it promised anything and everything whenever it thought promises would lull suspicion, and promised peace on the eve of initiating war."[195]

176. Finally, the Tribunal considered the provisions of the Kellogg-Briand Pact prohibiting war as an instrument of governmental policy while preserving the right of self-defence:

> "In addition to all speeches, assurances and treaties, Germany had signed the Kellogg-Briand Pact, which not only proscribed aggressive wars between nations, but abandoned war as an instrument of governmental policy and substituted conciliation and arbitration for it. One of its most important and far-reaching provisions was that it implicitly authorized the other nations of the world to take such measures as they might deem proper or necessary to punish the transgressor. In short, it placed the aggressor outside the society of nations. The Kellogg-Briand Pact, however, did not attempt to either prohibit or limit the right of self-defence, but it is implicit, both in its word and its spirit, that he who violates the treaty is subject to disciplinary action on the part of the other signatories and that he who initiates aggressive war loses the right to claim self-defence against those who seek to enforce the treaty. This was merely the embodiment in international law of a long-established principle of criminal law: '... there can be no self-defence against self-defence.'"[196]

(ii) The invasion of Austria and Czechoslovakia

177. The Tribunal proceeded to consider the alleged acts of aggression against the various countries,

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[193] Ibid., pp. 325-328.

[194] "The record is one of abysmal duplicity which carried in its train death, suffering and loss to practically every people in the world". Ibid., p. 333.

[195] Ibid., p. 332.

[196] Ibid., p. 329.

beginning with the invasions of Austria and Czechoslovakia. The Tribunal first considered the meaning of the term "invasion":

> "It must be borne in mind that the term 'invasion' connotes and implies the use of force. In the instant cases the force used was military force. In the course of construction of this definition, we certainly may consider the word 'invasion' in its usually accepted sense. We may assume that the enacting authorities also used the term in a like sense. In *Webster's Unabridged Dictionary*, we find the following definition of invasion: '... Act of invading, especially a warlike or hostile entrance into the possessions or domains of another; the incursion of an army for conquest or plunder'."[197]

178. The Tribunal considered the following factors in determining the aggressive character of the German invasion of Austria and Czechoslovakia:

(a) Hitler planned to seize both countries without regard to the wishes of their people, as evidenced by his statements at secret conferences held in 1937 and 1939;

(b) The Hitler regime, by fair means or foul, intended and proceeded to subsidize, direct and control the Austrian Nazi Party with the aim of annexing Austria;

(c) Germany had no intention of abiding by its agreements with Austria, all of which were violated;

(d) The Hitler regime used the same techniques of propaganda, coercion and violence in Austria which had succeeded in Germany;

(e) Germany gave Austria an ultimatum, with armed bands of Nazi units acting under German control, leaders acting under orders took possession of Vienna, seized control of the Government, ousted its leaders and placed them under guard, and German troops marched into Austria;

(f) Germany fomented and subsidized the Sudeten movement knowing that Czechoslovakia desired peace;

(g) Germany used the question of Sudeten Germans as an excuse for its demands at the Munich conference;

(h) At the Munich conference, Germany demanded the annexation of the Sudetenland land, which it had not previously suggested;

(i) Germany promised and declared that it had no further aggressive aims against the remnants of the Czech State after the Munich conference, when in fact such aggressive plans already existed and were ready to be implemented;

(j) Germany fomented, subsidized and supported the Slovakian independence movement while giving assurances of its friendship with the Czechs;

(k) Germany used the technique of agent provocateur in Czechoslovakia and again in Poland to create incidents as an excuse for military action;

(l) Hitler threatened President Hacha of Czechoslovakia with war and the destruction of Prague by aerial warfare and his armed forces marched into Bohemia and Moravia before Hacha was coerced into submission.[198]

179. The Tribunal furthermore considered the absence of armed resistance to the German invasion of Austria: "In view of the size of the German Army, the disproportion in manpower and military resources, no hope of successful resistance existed. Austria fell without a struggle and the Anschluss was accomplished."[199] Nonetheless the Tribunal concluded that the German invasion of Austria was an aggressive act because it was part of a well-conceived and carefully planned aggressive campaign and it was achieved by duplicitous means and overwhelming force:

> "That the invasion was aggressive and that Hitler followed a campaign of deceit, threats, and coercion is beyond question. The whole story is one of duplicity and overwhelming force. It was a part of a programme declared to his own circle, and was the first step in the well-conceived and carefully planned campaign of aggression: Austria first, Czechoslovakia second, and Poland third, while visions of the further aggressive aggrandizement were dangled before the eyes of the German leaders. Neither these acts nor the invasion by German armed forces can be said to be pacific means or a peaceful and orderly process within the meaning of the preamble to the

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[197] Ibid., pp. 330-331.

[198] Ibid., pp. 329-333.

[199] Ibid., p. 330.

> Kellogg-Briand Pact, and violated both its letter and spirit."[200]

180. The Tribunal also distinguished between military strategy and tactics in considering the aggressive nature of the invasion of Czechoslovakia:

> "We have already quoted Hitler's words as to his plans regarding the Czechoslovakian State. The objectives were fixed but the tactics of accomplishment were elastic and depended upon the necessities and conveniences of time and circumstance. This was no more than the distinction between military strategy and tactics. Strategy is the overall plan which does not vary. Tactics are the techniques of action which adjust themselves to the circumstances of weather, terrain, supply and resistance. The Nazi plans to destroy the Czech State remained constant. But where, when and how to strike depended upon circumstances as they arose."[201]

181. The Tribunal concluded that the invasions of Austria and Czechoslovakia were hostile and aggressive acts which amounted to acts of war carried out as an instrument of national policy:

> "The evidence with respect to both Austria and Czechoslovakia indicates that the invasions were hostile and aggressive. An invasion of this character is clearly such an act of war as is tantamount to, and may be treated as, a declaration of war. It is not reasonable to assume that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favourable consideration than a similar invasion which may have met with some military resistance. The fact that the aggressor was here able to so overawe the invaded countries does not detract in the slightest from the enormity of the aggression, in reality perpetrated. The invader here employed an act of war. This act of war was an instrument of national policy."[202]

182. The Tribunal rejected the possibility that the invasion of Austria was defensive in character. It noted that the defence had not urged that "this action arose because of any fear of aggression by that State, or that it had planned or proposed to join any other State in any aggressive action against Germany."[203] The Tribunal held that "the invasion of Austria was aggressive and a crime against peace within the meaning of Control Council Law No. 10."[204]

(iii) The invasion of Poland

183. Turning to Poland, the Tribunal emphasized that Germany had announced its excellent relations with Poland and given its assurance of peace when the plans for invading Poland were already decided upon.[205]

(iv) The invasion of Denmark and Norway: the claims of self-defence and military necessity

184. As regards Denmark and Norway, the Tribunal noted that Germany had concluded non-aggression pacts and given assurances to those countries when it was considering occupying them to obtain bases.[206] The Tribunal rejected the defence attempt to justify Germany's actions with respect to Denmark based on military necessity:

> "No justification can, or has been, offered for the invasion of Denmark, other than the pseudo one of military necessity. The Danes had maintained their neutrality and had given no offence to Germany. It was helpless and resistance hopeless, as the gallant but futile resistance of the Palace Guards indicated. But as we shall hereafter discuss, military necessity is never available to an aggressor as a defence for invading the rights of a neutral."[207]

185. The Tribunal also rejected the argument of self-defence with respect to the German invasion of Norway:

> "The defence insists that the invasion of Norway was justified because of French and British plans to land expeditionary forces there, in violation of Norwegian neutrality, and therefore Germany acted in self-defence. We may repeat the statement that, having initiated aggressive wars, which brought England and France to the aid of the Poles, Germany forfeited the right to claim

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[200] Ibid.

[201] Ibid., p. 332.

[202] Ibid., p. 330. The Tribunal also cited the consideration by another United States Military Tribunal of the nature and characteristics of war, inclusion invasion, in the *High Command* case discussed above.

[203] Ibid., p. 329.

[204] Ibid., p. 331.

[205] Ibid., p. 332.

[206] Ibid., p. 333.

[207] Ibid., p. 334.

> self-defence, but there are other and cogent facts which make this defence unavailable."[208]

186. In terms of other cogent facts negating a claim of self-defence, the Tribunal noted Germany's support for Quisling's attempt to gain control of Norway, Germany's failure to inquire whether Norway could or would protect its neutrality against the United Kingdom and France, Germany's fear that such an inquiry might encourage international efforts to maintain Norway's neutrality and prevent it from becoming a theatre of war and, finally, Germany's desire to obtain bases in Norway, which was a motivating factor for the invasion.[209] The Tribunal therefore held that "the invasion of Norway was aggressive, that the war which Germany initiated and waged there was without lawful justification or excuse and is a crime under international law and Control Council Law No. 10."[210]

(v) The aggression against Belgium, the Netherlands and Luxembourg

187. Turning to Belgium, the Netherlands and Luxembourg, the Tribunal noted that Germany had given assurances that it would observe its treaty obligations and had no hostile intentions after Germany had already planned to invade those countries when a propitious moment arose.[211] The Tribunal rejected the defence claim that the invasion of Belgium was justified because of conversations between Belgian and French military staffs and concluded that Germany had committed aggression against both Belgium and the Netherlands:

> "German preparations to invade Belgium had been matured long since and were hardly a secret. Belgium was properly concerned regarding her defence and possible aid if she were invaded, and her conversations with the French and English were addressed to this alone. Hitler's attack was without justification or excuse and constituted a crime against peace. As to Holland, there is even less ground for justification and excuse."[212]

188. The Tribunal also concluded that the German invasion of Luxembourg was aggressive and unlawful: "No justification or excuse is offered regarding the invasion of Luxembourg other than military convenience. No claim is made that Luxembourg had in any way violated its neutrality. In fact, it had not. The German invasion was aggressive, without legal justification or excuse."[213]

(vi) The aggression against Greece and Yugoslavia: the aggressor State's inability to claim self- defence and military necessity

189. As regards Greece, the Tribunal found that Germany had committed aggression even though the attack was initiated by its Axis partner Italy because Germany knew of the imminence of the attack and refused to take preventive action:

> "Germany's Axis partner, Italy, initiated an aggressive attack against Greece which the defence does not attempt to justify, but asserts that this was undertaken without previous consultations or agreement with Hitler. This appears to be true. But Germany had been advised by its representatives in Rome of the imminence of the attack and its Foreign Office knew of Greek apprehensions regarding the same, and it intentionally displayed ignorance and refused to take any action to prevent it. The German excuse for the attack on Greece is that England had landed certain troop elements in aid of Greece's defence against Italy and that as a matter of self-defence Germany was compelled to intervene, but an aggressor may not loose the dogs of war and thereafter plead self-defence."

190. The Tribunal further discussed the principle that an aggressor or its ally could not claim to have acted in self-defence with respect to the initial aggression or its subsequent expansion to other countries:

> "But even had the British rendered substantial aid to Greece, this did not serve as an excuse for Hitler's invasion. Italy was the aggressor. It was a signatory to the Kellogg-Briand Pact, and Britain had the right to come to the aid of Greece while Germany, on the other hand, had no right to come to the aid of the Italian

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[208] Ibid.

[209] Ibid.

[210] Ibid.

[211] Ibid., p. 333. "The testimony offered by the defence discloses that when the Third Reich assured the Low Countries that it intended to, and would, observe its treaty obligations and had no hostile intentions, the intention to invade had already been determined upon and was only awaiting a favorable moment." Ibid., p. 335.

[212] Ibid., p. 335.

[213] Ibid., p. 334.

aggressor. Nor is the argument of self-defence available to Germany. No nation which initiates aggressive war can avail itself of the claim of self-defence against those who have taken up arms against the aggressor. The first aggression stigmatizes every other act, either in waging war against or extending it to other countries. The action of Germany in Greece was aggressive and in violation of its treaty obligations, was without justification and in violation of international law."[214]

191. The Tribunal also rejected Germany's right to claim self-defence or military necessity with respect to the invasion of Yugoslavia because of its previous aggressive action:

> "The only justification offered for the German invasion of Yugoslavia is the coup d'état which overthrew the Government which had signed the Anti-Comintern Pact, and the fear that Yugoslavia would remain neutral only until such time as it might join the ranks of Germany's enemies.
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> "The unquestioned fact is that every country, and particularly those which lay along or near German boundaries, was fully aware that German actions in Austria, Czechoslovakia and Poland were aggressive and unjustified, and that in attacking and invading, Hitler had broken not only the provisions of the Kellogg-Briand Pact, but the pledges which he had given to those countries; each fully disapproved of Germany's actions and the question which lay in their minds was where the next blow would fall. We think there is no doubt whatsoever that every country in Europe, except its Axis partners, hoped for German defeat as the one insurance for its own safety, but such hopes cannot justify the German action against them.
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> "The claim of self-defence is without merit. That doctrine is never available either to individuals or to nations who are aggressors. The robber or the murderer cannot claim self- defence, in attacking the police to avoid arrest or those who, he fears, disapprove of his criminal conduct and hope that he will be apprehended and brought to justice.
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> "The invasion of Austria, the invasion of Bohemia and Moravia, and the attack on Poland were in violation of international law and in each case, by resorting to armed force, Germany violated the Kellogg-Briand Pact. It thereby became an international outlaw and every peaceable nation had the right to oppose it without itself becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim. The doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violations of that law."[215]

192. The Tribunal also concluded that the German invasion of Yugoslavia was aggressive, based on the following considerations:

> "An attempt was made to gain the adherence of Yugoslavia to the Tripartite Pact. Most of these negotiations were carried on by von Ribbentrop personally. The Yugoslavian Government finally agreed to become a signatory to that pact, but thereupon was overthrown by a coup d'état and the new Government which took its place rejected the proposed agreement and Hitler decided immediately on an invasion."[216]

(vii) The aggression against Russia

193. Turning to Russia, the Tribunal concluded that Hitler's aggression against that country was not induced by fear of attack, but rather by Russia's material resources.[217]

(viii) The aggression against the United States

194. As to the United States, the Tribunal held that Germany's declaration of war was an aggressive act which could not be justified by the fact that the United States had abandoned a neutral attitude and supported the nations which sought to defeat Germany:

> "That the United States abandoned a neutral attitude towards Germany long before Germany declared war is without question. It hoped for Germany's defeat, gave aid and support to Great Britain and to the Governments of the countries which Germany had overrun. Its entire course of conduct for over a year before 11 December 1941 was wholly inconsistent with neutrality, and that it had no intention of permitting Germany's victory,

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[214] Ibid., p. 379.

[215] Ibid., pp. 335-336.

[216] Ibid., p. 380.

[217] Ibid., p. 335.

even though this led to hostilities, became increasingly apparent. However, in so doing, the United States did not become an aggressor; it was acting within its international rights in hampering and hindering with the intention of ensuring the defeat of the nation which had wrongfully, without excuse, and in violation of its treaties and obligations, embarked on a coldly calculated programme of aggression and war. But such intent, purpose and action does not remove the aggressive character of the German declaration of war of 11 December 1941.

> "A nation which engages in aggressive war invites the other nations of the world to take measures, including force, to halt the invasion and to punish the aggressor, and if by reason thereof the aggressor declares war on a third nation, the original aggression carries over and gives the character of aggression to the second and succeeding wars."[218]

(ix) Conclusions regarding the alleged acts of aggression

195. Thereafter the Tribunal reached the following conclusions concerning the alleged acts of aggression:

> "We hold that the invasions and wars described in paragraph 2 of the indictment, against Austria, Czechoslovakia, Poland, the United Kingdom and France, Denmark and Norway, Belgium, the Netherlands and Luxembourg, Yugoslavia and Greece, the Union of Soviet Socialist Republics and the United States of America were unlawful and aggressive, violated international law and were crimes within the definition of the London Charter and Control Council Law No. 10."[219]

(e) Individual criminal responsibility

(i) High-level position

196. After finding that Germany had in fact committed the acts of aggression alleged in the indictment, the Tribunal then turned to the question of the criminal responsibility of individuals for those acts. As in the case of other tribunals that considered similar charges of crimes against peace, the Tribunal recognized that such aggression by a State could only be carried by persons holding high-level positions in various departments of Government:

> "It must be apparent to everyone that the many diverse, elaborate and complex Nazi programmes of aggression and exploitation were not self-executing, but their success was dependent in a large measure upon the devotion and skill of men holding positions of authority in the various departments of the Reich Government charged with the administration or execution of such programmes."[220]

(ii) The essential element of knowledge

197. Before considering the charges against the individual defendants, the Tribunal held that, as a matter of principle, actual knowledge of the aggressive character of Germany's acts was an essential element of guilt for crimes against peace, which were not criminal per se, in contrast to war crimes and crimes against humanity:

> "While we hold that knowledge that Hitler's wars and invasions were aggressive is an essential element of guilt under count one of the indictment, a very different situation arises with respect to counts ... which deal with war crimes and crimes against humanity. He who knowingly joined or implemented, aided or abetted in their commission as principal or accessory cannot be heard to say that he did not know the acts in question were criminal. Measures which result in murder, ill-treatment, enslavement and other inhumane acts perpetrated on prisoners of war, deportation, extermination, enslavement, persecution on political, racial or religious grounds, and plunder and spoliation of public and private property are acts which shock the conscience of every decent man. These are criminal per se."[221]

198. The Tribunal explained the element of knowledge required for individual criminal responsibility for acts of aggression:

> "Our task is to determine which, if any, of the defendants, knowing there was an intent to so initiate and wage aggressive war, consciously participated in either plans, preparations,

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[218] Ibid., p. 336.

[219] Ibid., pp. 336-337.

[220] Ibid., p. 338.

[221] Ibid., p. 339. The Tribunal also discussed the criminal responsibility of persons acting as principals and accessories. Ibid., pp. 337-338.

initiations of those wars, or so knowing, participated or aided in carrying them on. Obviously, no man may be condemned for fighting in what he believes is the defence of his native land, even though his belief be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own Government. One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.

"Any other test of guilt would involve a standard of conduct both impracticable and unjust."[222]

(iii) The claims of coercion and duress

199. The Tribunal rejected the defence claims of coercion and duress in relation to the high-level officials charged with crimes against peace:

> "We have considered the claims made by certain of the defendants that they carried on certain activities because of coercion and duress, and that therefore they were forced to act as they did and could not resign or otherwise avoid compliance with the criminal programme. It may be true that they could not have continued to hold office if they did not so comply, or that offers of resignation were not accepted, but, as the defendant Schwerin von Krosigk admits, there were other ways available to them by which they could have been relieved from continuing in their course. None of their superiors would have continued them in office had it constantly appeared that they disapproved of or objected to the commission of these criminal programmes, and therefore displayed a lack of cooperation. The fact is that for varying reasons each said as little as he could, and when he expressed dissent, did so in words which were as soft and innocuous as he could find.
>
> "We find that none of the defendants acted under coercion or duress."[223]

(f) von Weizsäcker

(i) General consideration of criminal responsibility and defence claims

200. The Tribunal began by considering the defendant's high-level official positions, general responsibilities, knowledge of the aggressive character of the invasions and wars, and specific conduct:

(a) He joined the Foreign Office in 1920, was appointed Ministerial Director of the Political Division in 1937, served as State Secretary from 1938 to 1943 and was appointed German Ambassador to the Vatican in 1943;

(b) As State Secretary he was second only to the Foreign Minister, von Ribbentrop, all divisions of the Foreign Office were subordinate to him and all of their activities were channelled through him or his office, all divisions reported to him and received instructions from him;[224]

(c) In terms of knowledge, he was not present at the conferences where Hitler announced his aggressive plans, but he became familiar with them from reliable sources (e.g., von Ribbentrop), who furnished him with accurate information;[225]

(d) He signed or initialled documents, had conferences with foreign diplomats, and gave directions to his subordinates and to the German diplomatic missions abroad.[226]

201. The Tribunal concluded that his conduct was "more than sufficient, unless otherwise explained, not only to warrant, but to compel a judgement of guilty". The Tribunal also noted that the defendant conceded "that to the outside world and to his chief, the Foreign Minister, he wore the face of a willing and earnest collaborator, or at least a consenting one in many

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[222] Ibid., p. 337.

[223] Ibid., p. 339.

[224] The Tribunal noted that the defendant's relationship with the Foreign Minister was never close and gradually deteriorated and, consequently, von Ribbentrop occasionally gave direct instructions to ministers and ambassadors abroad as well as divisions of the Foreign Office, without first consulting or informing him. Ibid., p. 340.

[225] The Tribunal noted that "he was neither deceived nor misled concerning the programme, although in certain instances he may not have been fully advised of the actually scheduled timetable. He makes no question about this." Ibid.

[226] Ibid.

instances".[227] However, the defence argued that, while the defendant appeared to collaborate, he never approved of the Nazi Party or Hitler's programme; he attempted to sabotage the programme; he was active in the resistance movement; he actively plotted and planned to remove Hitler from power with like-minded chiefs of the army when he realized that Hitler and von Ribbentrop's foreign policy entailed the danger of war and Hitler intended to use aggressive wars and invasions as a means to carry out his plans; and he used these methods out of loyalty to Germany and the German people because he was convinced that those policies entailed death, disaster and destruction for the German people and the ruin of Germany.[228]

202. The Tribunal concluded that it was necessary to consider this defence with great caution, particularly in the light of the defendant's inability to recall significant events and his insistence on being presented with documentary evidence before testifying on many subjects, while bearing in mind the conditions existing in Germany:

> "The defence that things are not what they seem, and that one gave lip service but was secretly engaged in rendering even this service ineffective; that, in saying 'yes', one meant 'no', is a defence readily available to the most guilty and is not novel either here or in other jurisdictions. Such a defence must be regarded with suspicion and accepted with caution, and then only when fully corroborated ...
>
> "It must be carefully considered, even though this consideration be accompanied with caution and even suspicion. A man is presumed to intend the natural consequences of his own deliberate acts, but this presumption fails if the evidence establishes that the contrary is true.
>
> "We recognize that, in the Third Reich, conditions which surround individuals in a free and democratic society did not exist, and that he who plotted against the dictator could not wear his heart upon his sleeve or leave a trail which could be readily followed. We therefore proceed to analyse the defendant's claims, check them against his acts, to evaluate the testimony offered upon his behalf in the hope thereby to unravel the tangled skein and ascertain the truth."[229]

203. The Tribunal rejected the claim that crimes of this magnitude could be justified by good intentions:

> "We reject the claim that good intentions render innocent that which is otherwise criminal, and which asserts that one may with impunity commit serious crimes, because he hopes thereby to prevent others, or that general benevolence towards individuals is a cloak or justification for participation in crimes against the unknown many.
>
> "Planning, preparing, initiating or waging aggressive war with its attendant horror, suffering and loss is a crime which stands at the pinnacle of criminality. For it there is no justification or excuse."[230]

(ii) The invasion of Austria

204. The Tribunal reviewed the evidence of the defendant's involvement in the invasion and annexation of Austria, including his participation in relevant discussions, meetings and conferences; his awareness of the illegal propaganda efforts in Austria; and his knowledge of the diplomatic justification for the invasion of Austria. However, the Tribunal concluded that this was not sufficient to establish his knowledge of and participation in planning, preparing and initiating the aggressive invasion:

> "These claims however do not establish guilt. The offence is the planning, preparation and initiation of aggressive invasions. That such an invasion took place as the result of planning, etc., is perfectly clear, but unless the defendant participated in them, he committed no offence under international law, and certainly not the one here charged.
>
> "In the absence of treaty obligations one may encourage political movements in another State, consort with the leaders of such movements and give them financial or other support, all for the purpose of strengthening the movement which has an annexation as its ultimate purpose without violating international law. It is only when these things are done with knowledge that they are a part of a scheme to use force and to be followed, if necessary, by aggressive war or invasion that an offence cognizable by this Tribunal comes into being. There is no evidence that von Weizsäcker at the time knew that Hitler intended to invade Austria. We think it may be fairly said that until

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[227] Ibid.

[228] Ibid., pp. 340-341.

[229] Ibid., p. 341.

[230] Ibid., pp. 341-342.

> the latter stages of the incident Hitler felt that his objectives could be attained by means other than invasion by the German armed forces; his own statements clearly show that if he could not do so he fully intended to use force. If, however, this was not known to von Weizsäcker at the time he acted, he committed no offence irrespective of how one may view the morality of the remainder of the programme. This Tribunal has jurisdiction over certain specified crimes, and has none over questions of morality not involved in those offences.
>
> "The evidence does not establish von Weizsäcker's guilt in connection with the invasion of Austria."[231]

(iii) The annexation of the Sudetenland by the Munich Pact and the subsequent invasion of Czechoslovakia

205. The Tribunal acquitted the defendant of criminal responsibility for the annexation of the Sudetenland by the Munich Pact based on the following considerations:

(a) The annexation was the result of an international agreement rather than an invasion or a war;

(b) The defendant did not know that Hitler did not intend to abide by the agreement and gave false assurances to the United Kingdom, France and Czechoslovakia of no further territorial aims;

(c) The defendant's written memoranda as well as testimony of resistance leaders and foreign diplomats indicated his opposition to aggressive war.

206. The Tribunal concluded that the defendant did not engage in planning or preparing an aggressive war, which in fact he opposed based on the belief that it would be unsuccessful and a disaster for Germany.[232]

207. The Tribunal initially convicted the defendant of criminal responsibility for the invasion and forcible incorporation of Bohemia and Moravia based on his full knowledge of the facts as well as the real and necessary part he played in implementing this programme:

> "He was not a mere bystander, but acted affirmatively, and himself conducted the diplomatic negotiations both with the victim and the interested powers, doing this with full knowledge of the facts. Silent disapproval is not a defence to action. While we appreciate the fact that von Weizsäcker did not originate this invasion, and that his part was not a controlling one, we find that it was real and a necessary implementation of the programme."[233]

208. The Tribunal noted that the defendant was not one of the originators of this programme, which he did not favour. Nonetheless the Tribunal concluded that "this attitude does not constitute a defence if, notwithstanding his inner disapproval, he became a party, or aided or abetted or took a consenting part therein. He was connected with it, and this in no small way."[234]

209. In response to a defence motion filed after the judgement was rendered, the Tribunal reversed this determination of guilt after learning that the defendant's attitude during testimony and cross-examination, which cast doubt on his credibility, was based on inappropriate advice by his American and German defence counsel. While this new information led the Tribunal to re-evaluate the factual evidence in a light more favourable to the defendant, it nonetheless upheld the general principles that led to its previous conviction:

> "We held that von Weizsäcker did not originate this aggression and that in our opinion he did not look upon it with favour. We further held that inner disapproval is not a defence if the defendant became a party to, aided in, abetted or took a consenting part therein. This is and always has been a fundamental principle of criminal law. To it we adhere.
>
> "Von Weizsäcker did not participate in any of these steps [planning, preparing and initiating the invasion of Czechoslovakia], he did not advise that they be taken, and as we held, we do not believe that they had his approval. This of itself, however, would not exonerate him if, in carrying out Hitler's plan, he took a part either in lulling Czech suspicion or in misrepresenting the planned course of Nazi action, either to the French or the English, with a view to forestalling timely diplomatic or other action on the part of those nations. One may become *particeps criminis* by doing either.
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> "We find no reason to change ... our findings that the defendant von Weizsäcker was aware of

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[231] Ibid., p. 343.

[232] Ibid., pp. 343-348.

[233] Ibid., p. 354.

[234] Ibid., p. 349.

Hitler's plans, even though he may not have been kept informed of precisely when or how they were to be put into execution. He so testified.

> "…
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> "None of these documents put von Weizsäcker in an amiable light or evidence either distaste or disapproval, contain many statements which von Weizsäcker knew and admits were false, and were official attempts to justify what he admits to have been unjustifiable. Nevertheless, we are here concerned with the legal effect of acts and not questions of individual or diplomatic morality.
>
> "It must be conceded that he made no attempt to mislead the Czechs, either as to the precarious situation in which their country was placed or as to the intentions or attitude of Germany, and it is apparent from von Weizsäcker's comments that the Czech Minister and Chargé d'affaires were under no illusions as to the danger in which their country was placed and had little doubt as to Hitler's plans. Nor can there be any doubt that the statement of the German position given to the French and British Governments was such as to put them on notice that Germany repudiated the agreement which Hitler had made in Munich regarding the guaranty of the remainder of the Czech State. It could not and did not allay either into a sense of false security.
>
> "Had the evidence disclosed that von Weizsäcker had either joined in making or carrying out the planned aggression or that, knowing of it, he had attempted to deceive the Czechs, the British or the French regarding the same, a verdict of guilty would be imperative.
>
> "After a careful examination of the entire record concerning his connection with the aggression against Czechoslovakia, we are convinced that our finding of guilt as to that crime was erroneous."[235]

(iv) The aggression against Poland

210. The Tribunal found that von Weizsäcker was not criminally responsible for the aggression against Poland because he played a role in implementing but not originating foreign policy; he did not participate in, plan, prepare or initiate the aggression; and he used every means in his power to prevent it, including warning other powers of the imminent aggression and urging them to take measures to prevent it. The Tribunal observed:

> "Von Weizsäcker had no part in the plan for Polish aggression; he was not in the confidence of either Hitler or von Ribbentrop. While his position was one of prominence and he was one of the principal cogs in the machinery which dealt with foreign policy, nevertheless, as a rule, he was an implementor and not an originator. He could oppose and object, but he could not override. Therefore, we seek to ascertain what he did and whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support. If in fact he so acted, we are not interested in his formal, official declarations, instructions or interviews with foreign diplomats. In this respect we proceed with caution and reserve before accepting his defence that while apparently acting affirmatively he was in fact acting negatively.
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> "…
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> "We deem the fact to be established that instead of participating, planning, preparing or initiating the war against Poland, the defendant used every means in his power to prevent the catastrophe. He was not master of the situation; he had no decisive voice, but he did not sit idly by and stolidly follow the dictates of either Hitler or von Ribbentrop, but by warnings to other powers, whom he knew would be involved in the war if Hitler's mad plan came to fruition, and by suggestions which he caused to be made to England to hasten the completion of its proposed pact with Russia, and by bringing all the pressure he could to cause the Italians to intervene, he sought to avert it. Although these efforts were futile, his lack of success is not the criterion. Personalities, hesitation, lack of vision and the tide of events over which he had no control swept away his efforts. But for this he is not at fault.
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> "We find that he is not guilty under count one respecting aggressive war against Poland."[236]

(v) The aggression against Denmark and Norway

211. The Tribunal also found von Weizsäcker not guilty of the charges relating to the aggression against

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[235] Order and Memorandum, ibid., pp. 950, 951, 953-956.

[236] Judgment, ibid., pp. 356, 369.

Denmark and Norway because he learned of the proposed invasions only after the policy decision had been taken, the plans had been made and their implementation was imminent; the role of the Foreign Office, in general, and von Weizsäcker, in particular, with respect to the aggression was insignificant; there was no time or opportunity for von Weizsäcker to take effective measures to prevent the aggression; and the evidence nonetheless indicated that he was apprehensive about the planned aggression and attempted to prevent it by pressuring Mussolini to discourage Hitler. The Tribunal observed:

> "We deem the precise date of von Weizsäcker's knowledge as immaterial. Hitler had already made his decision, the Wehrmacht had made its plans and was in fact on the move although acting with utmost secrecy. Nothing which von Weizsäcker could have done would have had any effect on the situation, and there was little or no time for manoeuvring, and little and probably no opportunity to give warning. The part that the Foreign Office played in the matter of these two aggressions is insignificant and consisted in sending notes by courier to its representatives in Denmark and Norway, who were at a specified hour and day to communicate their contents to those Governments. These notes were not prepared by von Weizsäcker and the most which can be said is that he either ordered or knew of the dispatch of the courier.
>
> "...
>
> "While it is not wholly clear that von Weizsäcker spoke with reference to Denmark and Norway, it is, we think, apparent that he was apprehensive of future action on the part of Hitler and was endeavouring to have pressure brought on Mussolini. We find von Weizsäcker not guilty under count one as to Denmark and Norway."[237]

(vi) *The aggression against Belgium, the Netherlands and Luxembourg*

212. The Tribunal acquitted von Weizsäcker of the charges relating to the aggressive invasions and wars against Belgium, the Netherlands and Luxembourg even though he knew of the aggressive plans, because he did not originate them, he was opposed to them and he advised against them. The fact that he did not attempt to prevent the aggression by warning other countries concerned of Germany's aggressive plans in this instance was not sufficient to render him criminally responsible, particularly in view of his unsuccessful attempts to do so with respect to the earlier aggressions. The Tribunal observed:

> "The question for determination is not whether von Weizsäcker had prior knowledge, but what if anything he did either to implement or, on the other hand, to prevent and frustrate these invasions. We shall in particular deal with these in the reverse order.
>
> "...
>
> "These documents do not evidence a desire to forward plans of aggressive war, but rather both a desire and a purpose to avert it. Such were his pacific professions, and we now turn to what is claimed to be his affirmative participation in these crimes against peace.
>
> "...
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> "During all this time, as he himself admits, he knew that the invasions were planned and prepared, and awaited only the strategic moment for their execution. Were we to judge him only by these things alone, we would be compelled to the conclusion that he was consciously, even though unwillingly, participating in the plans. But in determining matters of this kind we may not substitute the calm, undisturbed judgement derived from after-knowledge, wholly divorced from the strain and emotions of the event, for that of the man who was in the midst of things, distracted by the impact of the conflagration and torn by conflicting emotions and his traditional feelings of nationality.
>
> "This much is clear, that von Weizsäcker advised against the invasions and gave cogent reasons why they should not be embarked upon. His advice was rejected, and this rejection was not the first he had suffered. He had before warned the Western Powers, and unfortunately his warnings were ineffective. He had made suggestions which were or could not be carried out. The course of events had made his prophecies of failure and disaster seem like those of Cassandra. Even a stout heart for a time might fail under these circumstances, and the lethargy of futility take its place. That his opposition revived and that he played a real part in the continuous underground opposition to and plots against Hitler and further

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[237] Ibid., pp. 370, 372.

> forcible removal of that incubus from the scene of action, we have no doubt. Even heroes have their bad days, and while perhaps the defendant cannot be included in that category, he should not be held to a stricter test.
>
> "According to him the benefit of reasonable doubt, we are constrained to exonerate him. He did not originate the invasions and advised against them. He warned von Ribbentrop against the western offensives and the utilization of unrestricted submarine warfare. He may have failed to give the Belgians, Dutch and Italians [sic] specific warnings of the coming events, but that seems to be the extent of his misdoing. Under these circumstances we find the defendant von Weizsäcker not guilty with respect to the invasion of the Low Countries."[238]

(vii) The aggression against Greece and Yugoslavia

213. As regards Greece, the Tribunal noted that von Weizsäcker had informed Bulgaria that Germany agreed with its desire to obtain an outlet in the Aegean Sea and that Bulgaria must be willing to sign the Three-Power Pact. He also informed Turkey that Germany's decisions concerning the safety of the Balkans was irrefutable. However, the Tribunal concluded that he was not guilty of the invasion of Greece after finding that he did not plan, prepare for or initiate the war, or take any substantial part in it.[239]

214. The Tribunal also found von Weizsäcker not guilty of the aggressive invasion of Yugoslavia because Hitler was unwavering in his decision to invade that country and "von Weizsäcker had no part in making the decisions and no part in implementing them."[240]

(viii) The aggression against Russia

215. The Tribunal found von Weizsäcker not guilty of the aggression against Russia notwithstanding his knowledge of Hitler's plan to invade Russia because he took no affirmative action to initiate, plan or prepare for it; and he argued strongly against it. The Tribunal also held that he was not guilty even though he took no action to prevent the aggression, given that any such action would have been ineffective. The Tribunal further rejected the prosecution's argument that he should be found guilty because he did not desire the defeat of his own country. The Tribunal observed:

> "Other than exhibits which disclose that von Weizsäcker had knowledge of Hitler's plans to invade Russia, and this he admits, there is no evidence that he took any affirmative action towards initiating, planning or preparing for the aggression against that nation.
>
> "...
>
> "Notwithstanding his arguments regarding the necessity of destroying England, his memorandum is a strong argument against the invasion of Soviet Russia. And it is his attitude with regard to this charge in which we are here interested, and not his attitude toward England. In view of the peculiar mentality of von Ribbentrop and the necessity of couching arguments in terms which he would both understand and appreciate, it is quite understandable why sound advice would be coupled with pyrotechnics against a third power, namely, Great Britain. The situation here is different from one where a man argues one way and acts in another. In this case von Weizsäcker not only did not act, but no action would have been effective, and even sound advice was futile.
>
> "We have already held that mere knowledge of aggressive war or of criminal acts is not sufficient, but it is suggested that von Weizsäcker should have told the Russian Ambassador that he was aware of Hitler's plans of aggressions against that country. For an abundance of reasons, this cannot be made the basis of a judgement of guilt. We mention but a few. First, he could not talk with the Ambassador except through an interpreter and the hazard that the interpreter might betray him was obviously imminent, and the fatal consequences clear; second, there still remained the possibility either that Hitler might change his mind or that circumstances might arise which would compel him to alter his plans; and third, the revelation of the actual situation to the Russian Ambassador, even if it remained secret, would not cause Hitler to change his plans but would necessarily entail death and suffering to thousands of German youth, themselves innocent of any part in the planning, preparation and initiating of the aggression. The only course which we think he could follow or wisely attempt was the one he followed, namely, to submit the reasons why the proposed step was likely to be fatal to the German

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[238] Ibid., pp. 372, 375 and 378.

[239] Ibid., p. 380.

[240] Ibid.

> people. His advice was not followed and the failure to follow it brought disaster.
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> "The prosecution insists, however, that there is criminality in his assertion that he did not desire the defeat of his own country. The answer is: Who does? One may quarrel with, and oppose to the point of violence and assassination, a tyrant whose programmes mean the ruin of one's country. But the time has not yet arrived when any man would view with satisfaction the ruin of his own people and the loss of its young manhood. To apply any other standard of conduct is to set up a test that has never yet been suggested as proper, and which, assuredly, we are not prepared to accept as either wise or good. We are not to be understood as holding that one who knows that a war of aggression has been initiated is to be relieved from criminal responsibility if he thereafter wages it, or if, with knowledge of its pendency, he does not exercise such powers and functions as he possesses to prevent its taking place. But we are firmly convinced that the failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime."[241]

(ix) The aggression against the United States

216. The Tribunal found von Weizsäcker not guilty of the aggression against the United States after finding that he did not favour or recommend such action and he was not involved in advising or deciding to declare war on the United States:

> "Thus, it will be seen that von Weizsäcker was anxious not only that Japan remain an active member of the Tripartite Pact, and that he favoured Japan's expansion and aggression to the south-east, namely, towards Singapore, Burma and the Dutch Indies, and also against Russia, but that he was aware that this might bring in its train intervention on the part of the United States. But this does not establish that he favoured or recommended an aggressive war against the United States. Moreover, the record discloses that Japanese action was not induced by German prompting, but by its own evaluation of the situation and its own interests, and that the attack on Pearl Harbor and the Philippines was a surprise to Hitler, the Foreign Office and to von Weizsäcker.
>
> "The German decision to declare war on the United States was not made by or on the advice of von Weizsäcker. Thus, the evidence does not establish von Weizsäcker's guilt, and we exonerate him and find him not guilty so far as aggressive war against the Untied States of America is concerned."[242]

(g) Keppler

(i) General considerations

217. The Tribunal considered the following factors in determining the criminal responsibility of Keppler for the aggression against Austria:

(a) He was a manufacturer and played an important role in certain fields of the economy;

(b) He was a convinced Nazi and a follower of Hitler as early as 1927;

(c) He was an economic adviser to Hitler until Göring became Plenipotentiary for the Four Year Plan;

(d) In 1936, he was given full authority over the Nazi Party's activities in Austria and he exercised those functions as Hitler's direct representative;

(e) He delivered or reiterated the German ultimatum to Austria, namely, that Schuschnigg must resign and Seyss-Inquart be appointed in his place or the German Army would march in.[243]

(ii) The aggression against Austria

218. The Tribunal found Keppler guilty of the aggression against Austria after finding that he knew of Hitler's plans and played an important role in carrying them out:

> "The defendant would have us believe that he acted in a vacuum in this matter and had neither knowledge of nor activity in the unwarranted interference in Austrian affairs. His story, however, is quite incredible ... Keppler was in Vienna to do Hitler's will, and it is beyond the realm of possibility that he was not informed before he left Berlin precisely what was to occur and what part he was to play.

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[241] Ibid., pp. 381-383.

[242] Ibid., p. 385.

[243] Ibid., pp. 385-387.

> "Neither Hitler nor the Third Reich had the slightest justification or excuse to interfere in Austrian affairs, particularly in view of the provisions of the Treaty of Versailles and the agreements which the Third Reich entered into with the Austrian State. Hitler's actions became aggressive as soon as he felt that it was safe to do so and as soon as it became clear that there might be a plebiscite which possibly would upset his plans. Resistance by Austria was useless and hopeless, and therefore none was offered when the Wehrmacht poured over the borders and took possession of the Austrian State. But before the army marched in, armed bands of the SS and other Nazi organizations under German direction took possession of the Government, arrested its leading officers and patrolled the streets. In the unlawful invasion of Austria Keppler played an important part, and we find him guilty under count one."[244]

219. The Tribunal subsequently overruled and denied a defence motion to set aside Keppler's conviction under count one with respect to the aggression against Austria as without substance and adhered to the findings and conclusions contained in its judgement. The Tribunal emphasized the following aspects of its prior determination of criminal responsibility with respect to the aggression against Austria:

> "We have reviewed the testimony regarding Keppler's connection with the aggression against Austria, in view of the claims made by the defendant in his motion. We adhere to the findings and conclusions expressed in our judgement. His connection with the aggression is clear: he was in fact the direct representative of Hitler, and engaged in carrying out the plans for the invasions, which had already been made before he left for Vienna. He carried out his instructions, he delivered an ultimatum to President Miklas, the Party organizations had taken possession of the capital and ousted the lawful representatives of the Austrian Government in accordance with the German plans and orders before German troops actually entered Austria. The fact that this action was so successful and the invasion of the sovereignty of Austria so complete that, on the fateful night, he attempted to inform Hitler that an armed invasion by the Wehrmacht was not necessary, does not change the nature of his acts or relieve him from guilt. We overrule and deny his motion for acquittal under count one as to Austria."[245]

(iii) The aggression against Czechoslovakia

220. The Tribunal also convicted Keppler of the aggression against Czechoslovakia after finding that he knew of Hitler's aggressive plan, he knew that it was indefensible and he willingly participated in it, including negotiating a treaty of friendship and defence with Slovakia:

> "On 15 March [1939] Hitler summoned the aged and ailing Hacha, President of the Czechoslovakian Republic, to Berlin, and at an early hour of the morning, after threats that Prague would be bombed, Hacha was forced to submit. But German troops had already marched into Czechoslovakia hours before Hacha succumbed to Hitler's threats. The German troops met with some resistance from Czechoslovakian forces, but the Czechs were speedily overcome and the remainder of the Czech State fell. Keppler was present at Hitler's headquarters during the Hacha conference, but claims that he was only there to listen.
>
> "The defendant professes to have known nothing about Hitler's plan, although in one of his statements he admits that he thought something of that nature might occur. We are unable to believe him. He played an important part in this matter. The separation of Slovakia from the Czechoslovakian State was an important and an integral part of Hitler's plan of aggression.
>
> "Nor did he go to Czechoslovakia merely as an observer. In his own affidavit he admitted that he was assigned in March 1939 to negotiate and conclude a treaty of friendship and defence with Slovakia. We find that the defendant had knowledge of Hitler's plan for aggression against Czechoslovakia, knew that it was indefensible, and that he willingly participated in it. We find him guilty under count one in connection with the aggression against Czechoslovakia."[246]

221. As with the aggression against Austria, the Tribunal overruled and denied a defence motion to set aside Keppler's conviction under count one concerning the aggression against Czechoslovakia as without substance and adhered to the findings and conclusions

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[244] Ibid., p. 387.

[245] Order and memorandum, ibid., pp. 962, 963-964.

[246] Judgment, ibid., p. 389.

contained in its judgement. The Tribunal emphasized the following aspects of its prior determination of criminal responsibility with respect to the aggression against Czechoslovakia:

> "There is no substance to his motion regarding his conviction as a participant in the aggression against Czechoslovakia. While Slovakia may have been autonomous so far as its local government was concerned, it was an integral part of the Czechoslovakian State. Keppler played an important part in carrying out Hitler's plans for the dissolution of that state. Nor is it a fact that no armed resistance was offered to the German troops on their march into Bohemia and Moravia. Actual conflict took place. True, it was slight, but this was due to the overwhelming might of the German Army, and the duress imposed on the unfortunate President Hacha. We find no error in fact or law regarding the defendant's conviction under count one arising out of the aggression against Czechoslovakia, and overrule and deny his motion to set aside his conviction with regard thereto."[247]

(h) Woermann

(i) General considerations: high-level position and wide discretionary powers

222. The Tribunal noted that Woermann was Ministerial Director and chief of the Political Division of the Foreign Office from 1938 to 1943. The Tribunal rejected the defendant's claim that his position was of decreased significance and secondary importance after it had considered his important duties and assignments, which often involved wide discretion and influenced plans and policies. The Tribunal also considered his claim of unfriendly relations with his superior von Ribbentrop as insignificant, given that he kept his position, never attempted to obstruct the aggressive plans and instead actively participated in carrying them out. The Tribunal observed:

> "... The defendant did seek to show that the office of chief of the Political Division had decreased in significance so that during the time that he was head thereof it was an office of secondary importance. This however does not square with the facts. The record is replete with evidence of incidents showing that during the times in question Woermann was charged with and energetically carried out important duties and assignments which often involved the exercise of a wide discretion and had a bearing on the plans and policies which were being considered or were in the process of execution.
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> "The defendant also sought to show that he was on unfriendly terms with his chief, von Ribbentrop, from 1938 to 1943, and in his testimony before this Tribunal on 6 July 1948 he alluded to various incidents to support such claim. This, however, is not especially significant, for the fact remains that he actually stayed in office under von Ribbentrop from 1938 to 1943 — five eventful and critical years. Apparently their differences were not so fundamental as to have prompted Woermann to obstruct the plans or wishes of von Ribbentrop or to cause Woermann to fail in satisfactorily complying with von Ribbentrop's wishes in connection with the carrying out of the aggressive plans and policies of the Nazi regime. That Woermann did actively participate in carrying out the criminal plans and policies of the Reich seems to be amply borne out by the testimony."[248]

223. The Tribunal attributed particular importance to the wide discretionary powers given to Woermann and the extent to which he exercised them:

> "The foregoing [Woermann's role in the propaganda campaign against the United States and England] is of significance as indicating that wide discretionary power was in fact vested in Woermann's office and that he exercised the same to an extensive degree. Reference hereinafter made with respect to the charges against Woermann as they relate to the various countries involved further indicate the wide discretionary power vested in Woermann."[249]

(ii) The aggression against Poland

224. The Tribunal convicted Woermann of count one with respect to the aggression against Poland and acquitted him of the charges relating to the other aggressions. The Tribunal held that the defendant was guilty of the aggression against Poland after finding that: he "knew the criminal nature of the aims of the German aggression against Poland", based on a telegram he sent to a German embassy; he participated

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[247] Order and memorandum, ibid., p. 964.

[248] Judgment, ibid., p. 391.

[249] Ibid., p. 392.

in this aggression by sending telegrams and orders to German diplomats and missions; he sent to German missions the so-called "White Book" concerning the war on Poland, which revealed "the diplomatic tactics employed and in which Woermann participated in connection with the aggression against Poland"; he was responsible for deciding the measures to be taken by the High Command of the Armed Forces after the invasion of Poland (e.g., news black-outs and closing the frontier); and he was involved in requesting the Slovakian Government to make its army and its territory available to the German armed forces in the war against Poland and thereby "took a very decisive and affirmative step with respect to the Polish aggression". The Tribunal concluded that "the evidence adduced in this case, with respect to Poland, would seem to leave very little doubt as to the participation of Woermann in the diplomatic preparations for, and in the execution of the aggression against Poland."[250]

225. The Tribunal subsequently granted a defence motion to set aside this conviction and acquit Woermann of the charges relating to the aggression against Poland. The Tribunal indicated that, bearing in mind the principle *de minimus*, the decisive criterion was whether the defendant's conduct constituted "substantial cooperation or implementation of the aggressive plans and acts". The Tribunal concluded that, although Woermann knew of the aggressive plans, there was insufficient proof that his conduct involved any affirmative collaboration:

> "We have carefully reviewed the evidence against Woermann under count one relating to the aggression against Poland on which he was convicted, together with the motions submitted on his behalf.
>
> "This review confirms the findings which we made that he had knowledge that Hitler was about to institute an unlawful invasion of Poland, and that there was no legal excuse therefor. We adhere to these findings notwithstanding the fact that Woermann did not attend any of the Hitler conferences where the latter disclosed these plans to his immediate circle of advisers. The conclusion is inevitable, however, that at least by 1 August, the flow of events and the material which crossed Woermann's desk was of such a character that these plans and intent were made clear. Although it may well be that he was not informed of the date of the invasion, or of the tactical and strategic plans of the army, Woermann was not dwelling in a vacuum. It is clear, however, that he was not in a position to have prevented the invasion, even had he been inclined to do so. His guilt or innocence, therefore, depends upon whether or not what he did was a substantial cooperation or implementation of the aggressive plans and acts. To say that any action, no matter how slight, which in any way might further the execution of a plan for aggression, is sufficient to warrant a finding of guilt would be to apply a test too strict for practical purposes and the principle *de minimus* must be considered.
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> "After thorough study and reconsideration of the situation, we are convinced, first, that in some respects we did not properly evaluate some of the testimony, and second, that the remaining testimony does not establish his guilt beyond a reasonable doubt. Most of the documents relating to his connection with the aggression against Poland consisted of passing on information and directives prepared and prescribed by von Ribbentrop, and did not involve any affirmative collaboration on Woermann's part. He is entitled to the benefit of doubt, and should be acquitted under count one.
>
> "The conviction of the defendant Woermann under count one regarding the aggression against Poland is therefore set aside and he is declared acquitted thereon."[251]

(iii) The aggression against Czechoslovakia

226. The Tribunal found the defendant not guilty of the aggression against Czechoslovakia because, even though he was advised of the aggressive plans and prepared various related documents, he did not play a significant role, act affirmatively or otherwise contribute to planning or carrying out this aggression:

> "The foregoing evidence with respect to Woermann's activities in connection with Czechoslovakia substantiates the claim that his office was not without considerable authority and power in the shaping of policy in many matters. Such evidence does not adequately support the claim that, with respect to the plans for aggression against Czechoslovakia, the defendant did in fact play a significant role. The evidence would indicate that he was advised of what was

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[250] Ibid., pp. 393, 395 and 396.

[251] Order and memorandum, ibid., pp. 965-966.

> transpiring. The evidence does not indicate, however, affirmative acts on his part or such contributions to the plan or the execution thereof as to justify finding him guilty with respect to the aggression against Czechoslovakia."[252]

(iv) The aggression against Denmark and Norway

227. The Tribunal held the defendant not guilty of the aggression against Denmark and Norway based on insufficient evidence:

> "We come now to the question of the charges against Woermann with respect to the aggression against Denmark and Norway. It is the opinion of the Tribunal that the evidence with respect to the charges against Woermann in this connection is meager and unimpressive. It does not deem that the evidence with respect to these two countries would justify a finding of guilt against Woermann."[253]

(v) The aggression against Belgium, the Netherlands and Luxembourg

228. The Tribunal also found Woermann not guilty of the aggression against Belgium, the Netherlands and Luxembourg, even though he knew of the criminal plans, because there was insufficient evidence that he took part in initiating, assisted in formulating or took any affirmative action to consummate these plans:

> "While the evidence hereinbefore referred to would indicate that defendant Woermann was not without knowledge as to the criminal plans of the Reich with respect to Holland, Belgium and Luxembourg, it does not appear that he took part in the initiation or assisted in the formulation of the plans or took any affirmative action for the consummation of such plans. We will not therefore predicate a finding of guilt against defendant Woermann on account of the alleged aggression against the Netherlands, Belgium or Luxembourg."[254]

(vi) The aggression against Greece

229. The Tribunal found Woermann not guilty of the aggression against Greece even though he knew of the contemplated Italian invasion, because his acts did not constitute participation in this aggression:

> "With respect to the charges against Woermann in connection with the aggression against Greece, it does not appear that the evidence sustains the charges. It appears from the evidence that Woermann had knowledge of the contemplated Italian invasion of Greece, and it appears that Woermann, upon the instructions of the Reich Minister for Foreign Affairs, avoided meeting the Greek Minister who apparently was seeking information with respect to said matter from the German Foreign Office. A consideration of all the evidence adduced with respect to the charges against Woermann in connection with the aggression against Greece does not satisfy the Tribunal beyond reasonable doubt that Woermann's acts in connection therewith constitute such participation as to render him criminally liable therefor."[255]

(vii) The aggression against Yugoslavia

230. Similarly, the Tribunal acquitted Woermann of the aggression against Yugoslavia because, even though he was aware of the contemplated aggression, there was insufficient evidence that he initiated or implemented those plans:

> "The Tribunal considers the evidence with respect to the charges against defendant Woermann with respect to Yugoslavia as being entirely inadequate to sustain a finding of guilty. It does appear that Woermann was in possession of information with respect to activities which would indicate that aggression against Yugoslavia was being contemplated. The evidence, however, does not show that Woermann either initiated or implemented the plans for such aggression."[256]

(viii) The aggression against Russia

231. Finally, the Tribunal acquitted Woermann of the aggression against Russia because, even though he was advised of the aggressive plans, there was insufficient evidence that he originated, furthered, implemented or assisted materially in carrying out those plans:

> "We come now to the defendant's participation in the aggression against Russia. The Tribunal has examined the evidence with respect

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[252] Judgement, ibid., pp. 392-393.

[253] Ibid., p. 396.

[254] Ibid., p. 397.

[255] Ibid., p. 398.

[256] Ibid.

to these charges and does not believe that it justifies a finding of guilt against the defendant thereunder. Many of the exhibits were of an informational character advising Woermann of what was transpiring. That the plans originated from him or were subsequently furthered or implemented by him, or that he assisted materially in the carrying out of such plans has not adequately been proved to justify a finding of guilt against the defendant on this charge."[257]

(i) Lammers

(i) General considerations: high-level position, knowledge and participation

232. The Tribunal began by reviewing the evidence that indicated "the great importance and influence of the defendant Lammers in the higher Nazi circles in the distinctly policy-making sphere" and "his great activity and contribution to the furtherance and implementation of the Nazi aggressions against other countries generally".[258] The Tribunal noted the following:

(a) As Reich Minister and Chief of the Reich Chancellery, he held a position of influence and authority through which he collaborated with and greatly helped Hitler and the Nazi hierarchy in their aggressive plans;

(b) He exercised discretion and power in formulating and furthering Nazi plans and acts of criminal aggression;

(c) As early as 1936, he was called upon by Hitler and Göring to edit the draft Four Year Plan and he was instrumental in translating into decrees and ordinances Hitler and Göring's aggressive plans;

(d) He was a member of the committee of ministers created by Göring in 1936 to collaborate in making fundamental decisions;

(e) He was kept informed of the measures introduced by the General Council, which was a very important and active agency in planning invasions and other aggressions;

(f) He joined Hitler, Göring, Hess, von Ribbentrop, Keitel and others in signing the Reich Defence Law;

(g) He played an active role, together with other high representatives of the Reich, in the Reich Defence Council, which Hitler designated as "the determining body in the Reich for all questions for preparations for war", which Göring indicated would "discuss only the most important questions of Reich defence", and which played a significant role in preparing war laws and war decrees;

(h) He joined Hitler and Göring in signing the decree establishing the Ministerial Council for Reich Defence created for the specific purpose of waging war against Poland, which indicated the tremendously important role that he played in formulating legislation concerning Hilter's aggressive plans.[259]

(ii) The aggression against Austria

233. Turning to the specific charges of aggression, the Tribunal noted that Lammers' testimony indicated that "he knew the circumstances leading up to the invasion of Austria". However, the evidence of his participation before the invasion was limited to arranging for Keppler to attend a meeting with Hitler and the head of the Austrian Nazi Party. The Tribunal noted that he had signed a number of decrees concerning the reunion of Austria with the German Reich after the invasion, but held that the character of that conduct was not sufficient to find him guilty as charged. The Tribunal therefore acquitted Lammers of the charges relating to the aggression against Austria, even though he knew of the aggressive plans and preparations, after finding that he did not play an active role in formulating or implementing such plans:

> "While some of the foregoing events indicate knowledge of plans and preparations against Austria, they do not indicate that Lammers played an active role in the formulation or implementation of such plans. Acts of the defendant subsequent to the so-called Anschluss with reference to the administration of the seized territory are not of such character as to justify a finding of guilt against the defendant Lammers

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[257] Ibid.

[258] Ibid., p. 406.

[259] The Tribunal rejected his claim that he played a negligible role in formulating legislation to implement Hitler's aggressive war programme which was contradicted by his own admissions and the record of his involvement in formulating legislation concerning the aggressive plans, including war decrees with a criminal purpose. Ibid., pp. 401-406.

under the charges made against him with respect to Austria."[260]

(iii) The aggression against Czechoslovakia

234. As to Czechoslovakia, the Tribunal noted that Lammers took an active part in planning and preparing for the occupation of Bohemia and Moravia; he attended the meeting at which Hitler and others presented an ultimatum to President Hacha; he went to Prague to assist in carrying out the aggression against Czechoslovakia; he drafted and signed the decree establishing the Protectorate of Bohemia and Moravia, whose terms indicated the utter callousness of the Nazi hierarchy in carrying out their aggressive plans; and he signed other decrees concerning the administration of the Protectorate. The Tribunal concluded that "the foregoing references certainly indicate knowledge of and participation in the plans for the invasion of Czechoslovakia, that is, Bohemia and Moravia, and participation in the formulation and carrying out of policies in Bohemia and Moravia after the invasion thereof".[261]

(iv) The aggression against Poland

235. With regard to Poland, the Tribunal noted that Lammers had received a communication concerning the aggressive plans for Poland; he was involved in planning, preparing and other activities connected with this aggression; and he signed a number of decrees providing for the incorporation of Poland into the Reich and the administration of Poland. The Tribunal found that Lammers' knowledge and participation concerning the aggression against Poland was far from perfunctory and that he continued to play an important role in formulating legislative matters pertaining to Poland. The Tribunal concluded that Lammers' criminal participation in the criminal aggression against Poland was established beyond a reasonable doubt.[262]

(v) The aggression against Norway and Denmark

236. As regards Norway and Denmark, the Tribunal noted that Lammers knew of and participated in the aggression against Norway; he knew of and became involved in planning and preparing for the invasion of Norway at an early date; he was closely connected to and participated in planning the invasion and occupation of Norway; and he joined Hitler and others in signing a decree concerning the Government of occupied Norway immediately after its invasion, which provided that Lammers would issue the necessary implementing regulations in the civilian sector. The Tribunal concluded that "the foregoing evidence, as heretofore indicated, establishes beyond a reasonable doubt the criminal participation of Lammers in the preparations leading up to Norway's invasion, and in the subsequent administration of the occupied country".[263] In contrast, the Tribunal found very little evidence that Lammers participated in the invasion and subsequent administration of Denmark and this evidence did not justify finding him guilty with respect to the invasion and occupation of Denmark.[264]

(vi) The aggression against Belgium, the Netherlands and Luxembourg

237. Regarding Belgium, the Netherlands and Luxembourg, the Tribunal noted that Lammers was responsible for issuing and informing a limited number of high-level officials about a decree approved by Hitler concerning preparations for the occupation of those countries more than three months before they were invaded. The Tribunal observed that, "in the light of his obvious knowledge, and in view of the participation of Lammers in the handling of the foregoing decree, no time need be spent in consideration of Lammers' representations to the effect that contemplated military operations were not imparted to the civilian officials".[265] The Tribunal also noted that Lammers joined Hitler and others in signing a decree concerning the administration of the occupied countries, which provided that Lammers would issue the implementing regulations in the civilian sphere. The Tribunal concluded that "the evidence above referred to, and evidence in the record, not specifically mentioned herein, indicates clearly that Lammers was a criminal participant in the plans and preparations for the invasion of and aggression against Belgium, Holland and Luxembourg, and in the Reich's administration of said countries after their invasion".[266]

(vii) The aggression against Russia

238. As to Russia, the Tribunal noted that Lammers joined Hitler in signing a decree providing for central

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[260] Ibid., p. 406.

[261] Ibid., pp. 407-408.

[262] Ibid., pp. 408-409.

[263] Ibid., p. 412.

[264] Ibid.

[265] Ibid., p. 413.

[266] Ibid., p. 414.

control of questions concerning the Eastern European region and that various documents indicated his knowledge of and involvement in preparing for the occupation of the eastern territories. The Tribunal concluded that the evidence indicated that he had actively participated in planning and carrying out the aggression against Russia.[267]

(viii) Conclusion

239. The Tribunal convicted Lammers of several charges of aggression under count one:

> "From the evidence adduced in support of the charges against the defendant Lammers under this count, with respect to the alleged acts of aggression against Czechoslovakia, Poland, Norway, Holland, Belgium, Luxembourg and Russia, it is established beyond a reasonable doubt that the defendant Lammers was a criminal participant in the formulation, implementation and execution of the Reich's plans and preparations of aggression against those countries. We find the defendant Lammers guilty under count one."[268]

240. In response to a defence motion, the Tribunal reconsidered its judgement with respect to Lammers. In affirming his conviction under count one, the Tribunal emphasized its careful consideration of Lammers' authority, his policy-shaping power and his actual participation in the criminal plans and aims that were the subject of various charges:

> "One of the basic matters in this case, and to which the majority, at least, gave a great amount of study, was the question of Lammers' authority and policy-shaping power, and his actual participation in the furthering and carrying out of Hitler's plans and aims."[269]

241. The Tribunal later again emphasized that "what power and authority Lammers actually exercised is the important thing here".[270]

242. The Tribunal also considered it unnecessary to comment on the repeated assertion that only Hitler could be held responsible for the crimes of the Nazi regime because he had the ultimate right of decision:

> "The assertions made by the defendant himself in the course of testifying before the Tribunal, and the arguments heretofore made by counsel, would indicate that in their view only Hitler could be responsible for all the crimes of the Nazi regime; that no one, despite his active participation in perfecting and carrying into effect the plans and aims of Hitler, would be guilty also, because such participant and collaborator did not have the right of ultimate decision in the matter — such right of decision resting with Hitler. We need not comment on such a view."[271]

(j) Koerner

(i) General considerations: high-level position and knowledge

243. The Tribunal began by considering the high-level positions held by Koerner in the Government of the Third Reich over a 12-year period from the rise of Nazi power to its collapse in 1945, namely: deputy to Göring, the most powerful man in the Reich in the economic field as Plenipotentiary in charge of the Four Year Plan to prepare Germany for war; deputy chairman of the General Council; and member of the Central Planning Board. The Tribunal found that the Four Year Plan was instrumental in planning, preparing and waging aggressive war.[272] The Tribunal also found that Koerner was in charge of the management and supervision of the office of the Four Year Plan; he was responsible for submitting questions for Göring's decision, preparing those decisions as chairman of the General Council, and preparing and publishing the necessary orders and instructions after Göring had taken the fundamental decisions; and he coordinated the activities of various agencies concerning the Four Year Plan, particularly in the General Council.[273]

244. The Tribunal rejected Koerner's assertion that Göring was a man of peace who tried to avoid war as a transparent effort to conceal Koerner's own knowledge and motives. The Tribunal also rejected Koerner's assertions that he did not know of the aggressive nature of the plans and that he had no real authority or discretionary power. The Tribunal noted that Koerner represented Göring at important meetings where policies were formulated and found "that a man in such position could be without knowledge as to the

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[267] Ibid., pp. 414-415.

[268] Ibid.

[269] Order and memorandum, pp. 972, 974.

[270] Ibid., p. 975.

[271] Ibid., p. 976.

[272] Judgement, ibid., p. 421.

[273] Ibid., pp. 425-426.

aggressive nature of the plans under consideration is impossible of belief".[274] The Tribunal also found that the evidence did not support Koerner's assertion that he had no real authority or discretionary power in his high positions. The Tribunal concluded that the evidence established "the wide scope of his authority and discretion in the positions he held, and which enabled him to shape policy and influence plans and preparations of aggression".[275] The Tribunal observed:

> "In the light of the foregoing and other evidence in the record not here specifically alluded to which establishes the wide scope of his authority and activities as Göring's deputy in the Four Year Plan; and his close association both socially and officially with Göring; and his long service as deputy chairman of the General Council at the meetings of which he, and not Göring, usually presided; his asserted ignorance of the role of the Four Year Plan in the plans, preparations and execution of various Nazi aggressions here involved becomes incredible."[276]

(ii) The aggression against Austria

245. Turning to the aggression against Austria, the Tribunal did not find direct evidence that Koerner knew of the exact date of the invasion of Austria, but found it evident that he knew the invasion was contemplated and regarded it as a proper act. The Tribunal also referred to Koerner's activities following the invasion:

> "Immediately following the invasion of Austria it appears that Koerner was instrumental in accelerating the production of munitions of war. It is claimed that this was for defensive purposes only, and he persists that Göring warned Hitler against actions that would lead to war. Meanwhile, however, Göring was urging the construction of bombers capable of carrying a bomb load of 5 tons to New York and then returning. Koerner admits that he knew of this activity of Göring's."[277]

(iii) The aggression against Czechoslovakia

246. As regards Czechoslovakia, the Tribunal found that Koerner knew of the aggressive plans and rejected the defence assertion that Göring opposed them:

> "With respect to the invasion of Czechoslovakia which took place on 15 March 1939, the evidence shows conclusively that Koerner was aware of the impending aggression sometime before it occurred. Here again he asserts it was Göring who told him that Hitler was going to occupy Prague, and that Göring was opposed to the contemplated action as he feared it would lead to war. In this connection it is again well to remember that the IMT findings are to the effect that Göring admitted that he had threatened to bomb Prague if President Hacha of Czechoslovakia did not submit."[278]

(iv) The aggression against Poland

247. With regard to Poland, the Tribunal found that Koerner knew of the aggressive plans and rejected the defence assertion that Göring opposed them, as follows:

> "In August 1939 Koerner admits he was told by Göring that Hitler then had decided to attack Poland, and again Göring is alleged to have indicated that he was opposed to the contemplated move. It appears, however, that the defendant's attitude as a witness is such that his assertions as to Göring's attitude cannot be accepted without reservation. The defendant has admitted that under certain conditions he will not as a witness tell the whole truth."[279]

(v) The aggression against Russia

248. As to Russia, the Tribunal found that Koerner knew[280] of the planned attack on Russia and participated[281] in planning, preparing and executing this aggression. The Tribunal held as follows:

> "We have specifically alluded to but a small portion of the voluminous evidence introduced with respect to these matters, but the foregoing and other evidence in the record satisfies the Tribunal beyond reasonable doubt that defendant Koerner participated in the plans, preparations and

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[274] Ibid., p. 424.

[275] Ibid., p. 425.

[276] Ibid., p. 426.

[277] Ibid., p. 428.

[278] Ibid., p. 429.

[279] Ibid., pp. 430-431.

[280] "In testifying before the Tribunal on 30 July 1948, Koerner admitted that he had advance notice of the planned attack on Russia." Ibid., p. 433.

[281] "The evidence indicates that Koerner participated in the planning and preparation of the aggression against Russia." Ibid., p. 431.

> execution of the Reich's aggression against Russia."[282]

249. The Tribunal rejected the defence claim that "the attack against Russia 'was not an illegal aggression but a permissible defensive attack'" for the same reasons as the Nuremberg Tribunal referred to previously.[283]

(vi) Conclusion

250. The Tribunal convicted Koerner of count one. The defence filed a motion asserting that the conviction was erroneous because the defendant did not occupy positions on the policy-making level. The Tribunal upheld the conviction based on the aggressive war against Russia after finding that there were no factual errors of any material significance:

> "The defendant's contentions with respect to the conviction on count one must be overruled. A careful reading of the judgement with respect to count one indicates that although there was considerable evidence showing knowledge by Koerner of the various planned aggressions of the Reich prior to the attack on Russia, and which aggressions were carried out, the conviction of Koerner under said count is in fact specifically based on the aggressive war on Russia ...
>
> "We do not observe any claimed factual errors on this specific phase of the charge against Koerner under count one. Certainly there are none of any material significance."[284]

(k) Ritter

251. The Tribunal noted that Ritter rejoined the Foreign Office in 1923, became Ambassador for Special Assignments in 1938 and was liaison officer between the Foreign Office and Field Marshall Keitel of the Wehrmacht from 1940 to 1944. The Tribunal acquitted Ritter of count one, even though he held an important position and undoubtedly contributed to waging the wars, because there was no evidence that he took part in or was informed of Hitler's aggressive plans or that he knew of the aggressive nature of the wars:

> "There is no evidence that he took part in or was informed of any of Hitler's plans of aggression. While his position as liaison officer between von Ribbentrop and Keitel was one of substantial importance, and his efforts undoubtedly contributed to the waging of these wars, there is no proof that he knew that they were aggressive. Such knowledge is an essential element of guilt. In its absence, he should be, and is acquitted under count one."[285]

(l) Veesenmayer

252. The Tribunal noted that Veesenmayer held a minor position in the defendant Keppler's office until long after Hitler's last aggression. Nevertheless, he received several assignments concerning foreign political developments, he accompanied Keppler to Austria when the latter was assigned to handle the Austrian situation up to the Austrian Anschluss, and he was sent to Danzig prior to the invasion of Poland. However, the Tribunal acquitted Veesenmayer of count one because there was "no evidence that he had any knowledge of Hitler's aggressive plans, and it is most unlikely that one holding such a minor position would have been informed of them".[286]

(m) Stuckart

253. The Tribunal noted that Stuckart was the responsible chief of one of the principal sections of the Ministry of the Interior and became a Secretary of State in that ministry when Himmler was appointed Minister of the Interior in 1943. However, the Tribunal also noted that he did not attend Hitler's conferences in which plans for aggressive wars were proposed and discussed and that the positions he held after those aggressions took place concerning the administration of the occupied territories were not relevant to the present charges under count one. The Tribunal acquitted Stuckart of count one after finding that his guilt had not been proved beyond a reasonable doubt because it could not find "any evidence that he had knowledge of these aggressions or that he planned, prepared, initiated or waged these wars".[287]

(n) Darré

254. The Tribunal noted that Darré was Reich Minister for Food and Agriculture, head of the Reich Food Estate and a member of the Reich Cabinet from the Nazi's seizure of power until his removal from office. However, the Tribunal acquitted Darré of count one

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[282] Ibid., p. 434.

[283] Ibid., pp. 434-435.

[284] Order and memorandum, ibid., pp. 995, 997.

[285] Judgement, ibid., p. 399.

[286] Ibid.

[287] Ibid., p. 416.

based on insufficient evidence that he knew of the aggressive plans. The Tribunal cautioned against making such a finding based on successive inferences:

> "... he never attended any of the conferences at which Hitler disclosed his plans of aggression, and there is no evidence that he was informed of them, with the following exception, namely: A letter which he wrote to Göring early in October 1939 when he was engaged in a dispute with Himmler over the jurisdiction between his office and the Office for the Strengthening of Germandom, in which he stated that the plans for the resettlement of ethnic Germans in the east had been developed over a long period by himself and his organization. But from this fact it is necessary not only to infer that he knew that war was likely, but a second inference that he knew that it would be an aggressive war. The danger of setting inference upon inference, and from the second inference drawing a conclusion of guilt involves a degree of speculation in which the element of likelihood of mistake is too great."[288]

(o) Dietrich

255. The Tribunal noted that Dietrich held high-level positions in the German and Nazi press, which he controlled. However, the Tribunal acquitted Dietrich of count one after finding that his guilt had not been proved beyond a reasonable doubt, based on insufficient evidence, rather than mere suspicion, that he knew of the aggressive plans:

> "The defendant Dietrich was Reich press chief and press chief of the Nazi Party during the entire period when the German aggressive wars were planned and initiated, and while he was in constant attendance at Hitler's headquarters as a member of his entourage, the only proof that he had knowledge of these plans is that he had control over the German and Party press which played the tune before and upon the initiation of each aggressive war, which aroused German sentiments in favour of them, and thus influenced German public opinion.
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> "Although he attended none of the Hitler conferences to which we have adverted, we deem it entirely likely that he had at least a strong inkling of what was about to take place. But suspicion, no matter how well founded, does not take the place of proof. We therefore hold that proof of guilt has not been shown beyond a reasonable doubt, and the defendant Dietrich is acquitted under count one."[289]

(p) Berger

256. The Tribunal acquitted Berger of count one, even though he participated in waging war, because of lack of evidence that he knew of their aggressive or unlawful character:

> "There is no evidence whatever that the defendant Berger had knowledge of Hitler's aggressions. While, without question, he vigorously engaged in waging wars, there is nothing to indicate that he knew that they were aggressive or in violation of international law."[290]

(q) Schellenberg

257. The Tribunal noted that Schellenberg was a minor official in the SD and was involved in the incident on Netherlands territory which Hitler used as an excuse to invade the Low Countries. However, the Tribunal acquitted Schellenberg of count one after finding no evidence that he took part in planning, preparing or initiating the wars; knew of their aggressive character; or with such knowledge engaged in waging war:

> "At the beginning of the wars described in the indictment, the defendant Schellenberg was a comparatively minor official in the SD. He took an active part in the Venlo incident in which two British agents, Stevens and Best, were kidnapped on Dutch soil and brought to Germany, and the Dutch army officer Klopf was killed. The prosecution asserts that this incident was used by Hitler as an excuse for the invasion of the Low Countries, · and therefore Schellenberg is criminally liable.
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> "We have no doubt that he was responsible for the incident in question, and we cannot accept his defence that he did not know of and had no control over these kidnappings and the assassination of Klopf. The fact that after it had occurred he was sent to the Foreign Office to make a report, and that it was the intention of his superiors to use his report as proof that the Netherlands had violated its neutrality is not sufficient, as the record does not disclose that he

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[288] Ibid., p. 417.

[289] Ibid.

[290] Ibid.

had any knowledge as to the purpose for which the report was to be used.

> "While his part in the Venlo incident may subject him to trial and punishment under Dutch law, that is a matter over which this Tribunal has no jurisdiction. There is no evidence tending to prove that he took any part in planning, preparing or initiating any of the wars described in count one, or that he had knowledge that they were aggressive, or that with such knowledge he engaged in waging war."[291]

(r) Schwerin von Krosigk

258. The Tribunal noted that Schwerin von Krosigk was Reich Minister of Finance and a member of the Reich Cabinet during the entire Hitler regime. The Tribunal acquitted Schwerin von Krosigk of count one after finding that, even though he dealt with waging war, there was no proof that he knew of the aggressive character of the wars:

> "He was not present at any of the Hitler conferences at which the latter announced his plans, nor was he one of Hitler's confidants. That many of his activities and those of his department dealt with waging war cannot be questioned, but in the absence of proof that he knew these wars were aggressive and therefore without justification, no basis for a judgement of guilty exists."[292]

(s) Pleiger

259. The Tribunal acquitted Pleiger of count one notwithstanding his activities in the economic and industrial field based on insufficient proof that he knew of or took part in planning, initiating or waging aggressive war. Referring to the Nuremberg Tribunal judgement, the Tribunal held that rearmament was not a crime under international law unless it was undertaken with the intent and purpose of using the rearmament for aggressive war:

> "There is no evidence which tends to assert that Pleiger had any knowledge of or took any part in the plans, initiating or waging of aggressive war. His field of activities was wholly in the economic and industrial field. He of course had knowledge that Germany was rearming, and the development of the iron ore field at Salzgitter, and of the Hermann Göring Works there, which were organizations entirely the children of his brain and the result of his energy. But, as was determined by the International Military Tribunal, rearmament, in and of itself, is no offence against international law. It can only be so when it is undertaken with the intent and purpose to use the rearmament for aggressive war."[293]

H. *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany* v. *Hermann Roechling et al.* (the *Roechling* case)

1. The charges of crimes against peace

260. In this case, the directors of the Roechling firm were charged with committing crimes against peace by encouraging and contributing to the preparation and conduct of aggressive wars.[294] However, the prosecution dropped those charges against all of the accused except Hermann Roechling during the course of the trial.[295]

2. The judgement of the General Tribunal

261. The General Tribunal convicted Hermann Roechling of committing crimes against peace by waging aggressive wars based on the following considerations:

(a) His action and personal initiative, particularly as Plenipotentiary General, which resulted in enslaving the steel industry in occupied countries to increase the war potential of the Reich;

(b) His activity and personal initiative, as president of the Reich Association Iron, to increase the iron and steel production of the Reich and all occupied countries for the purpose of waging aggressive wars;

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[291] Ibid., p. 418.

[292] Ibid.

[293] Ibid., p. 435.

[294] The charges of crimes against peace were initially filed against the five accused in this case, who were all directors of the Roechling firm, namely: Hermann Roechling, Ernst Roechling, Hans Lothar von Gemmingen-Hornberg, Albert Maier, and Wilhelm Rodenhauser. Indictment, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1949, vol. XIV, pp. 1061, 1072-1074.

[295] Judgement of the General Tribunal, 30 June 1948, ibid., pp. 1075, 1076.

(c) His advice to the Nazi Government concerning the deportation of inhabitants of occupied countries to force them to work or to fight against their own country.[296]

3. The judgement of the Supreme Military Government Court

(a) Sufficient and intentional collaboration

262. After considering the findings of the Nuremberg Tribunal, the Court indicated that Roechling's guilt or innocence depended on whether his activity constituted a sufficient, intentional collaboration with Hitler or Göring in preparing and waging aggressive war:

> "Göring was instructed to coordinate all the problems pertaining to the raw materials necessary for the preparation and waging of the war; the International Military Tribunal established in principle that, next to Hitler, he was the actual originator of the wars of aggression; that he was the originator of all Germany's war plans; and that it was he who carried out their military and diplomatic preparation.
>
> "In order to determine Hermann Roechling's guilt or innocence with regard to the crime against peace, therefore, it must be established whether his activity constitutes a sufficient and, in particular, an intentional collaboration with Hitler or with Göring in the preparation and the waging of war which was a war of aggression."[297]

(b) The principal originators

263. After comparing the relevant provisions of the Nuremberg Charter and Control Council Law No. 10 with respect to crimes against peace, the Court concluded that "it is only the principal originators of the crimes committed against peace who are to be prosecuted and punished".[298] It also concluded that this interpretation was confirmed by the judgement of the Nuremberg Tribunal and the judgement of the United States Military Court in the *Farben* case.[299]

(c) Intent

264. The Court found Roechling not guilty of preparing for aggressive war based on insufficient evidence that he participated in the rearmament of Germany with the necessary intent of furthering an invasion or an aggressive war:

> "According to decisions of the trial judges of the IMT, the armament of a country need not of necessity be based on the intention to unleash a war of aggression. No sufficient evidence has been brought to show that Hermann Roechling's participation in the rearmament was carried out with the intention and aim to permit an invasion of other countries or a war of aggression in violation of international law or of international agreements."[300]

(d) A leading part

265. The Court also found Roechling not guilty of waging aggressive war because he did not play a leading part in the war efforts of his country and he directed the iron industry only after the outbreak of the aggressive wars:

> "In spite of this [his high administrative offices and his position in the iron industry with respect to Germany and the occupied countries], the Tribunal is of the opinion that Hermann Roechling, while participating in the war efforts of his country, did not play a part which might be evaluated as a leading part within the meaning of the established legal interpretation of the provisions of (Control Council) Law No. 10. Besides, it has been established that Hermann Roechling did not take over the direction of the iron industry until long after the outbreak of all the wars of aggression.
>
> "There is no doubt that as head of the iron production he supported Germany's war efforts to a considerable extent; but in doing so he did not participate in any way in the waging of the war."[301]

(e) Conclusion

266. The Supreme Military Government Court of the French Occupation Zone in Germany reversed the conviction of Hermann Roechling for crimes against

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[296] Ibid., p. 1095.

[297] Judgement of the Supreme Military Court, 25 January 1949, ibid., pp. 1097, 1107.

[298] Ibid., p. 1108.

[299] Ibid.

[300] Ibid.

[301] Ibid., p. 1109.

peace. After noting that the Nuremberg Tribunal had acquitted Speer of the charges that he participated in waging war, the Court concluded:

> "Summarizing, the Tribunal finds Hermann Roechling in respect of the preparation and waging the war of aggression — in spite of his participation in certain conferences with Göring, in spite of his determination to get the principle of the utilization of low-grade ores accepted, in spite of his letter to Hitler of June 1940, in spite of his programme for the Germanization of the annexed provinces, in spite of his appointment as "General Plenipotentiary", "Reich Plenipotentiary" and president of the Reich Association Iron, in which capacity he gave a lecture in Knuttange in order to explain his authoritative power, and in the course of which his vanity perhaps allowed him to attribute more authority to himself than he was actually entitled to ..., in spite of numerous other actions, which are besides evaluated as component parts of war crimes — remains outside the boundary which 'has been fixed very high by the IMT.'"[302]

III. The Tokyo Tribunal

A. Establishment

267. The Tokyo Tribunal was established for the purpose of trying the major war criminals in the Far East, whose offences included crimes against peace, on 19 January 1946. In contrast to the Nuremberg Tribunal, the Tokyo Tribunal was established by Special Proclamation of the Supreme Commander for the Allied Powers, General Douglas MacArthur, pursuant to the Potsdam Declaration of 26 July 1945, in which the Allied Powers at war with Japan declared that bringing war criminals to justice would be one of the terms of surrender, and the Instrument of Surrender of Japan of 2 September 1945, in which Japan accepted the terms of the Declaration.[303] The Charter setting forth the constitution, jurisdiction and functions of the Tokyo Tribunal was also approved by the Supreme Commander of the Allied Powers, General MacArthur, on 19 January 1946, and subsequently amended by his order of 26 April 1946.[304] Whereas the United Nations General Assembly affirmed the principles of international law recognized by the Charter and the judgement of the Nuremberg Tribunal, it merely took note of the similar principles adopted in the Tokyo Charter.[305]

B. Jurisdiction

268. The Tokyo Tribunal was empowered to try and punish Far Eastern war criminals who had, inter alia, committed crimes against peace, including: planning, preparing, initiating or waging a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the above.[306]

269. Unlike the Nuremberg Charter, the Tokyo Charter defined crimes against peace with reference to "a *declared or undeclared* war of aggression". The difference in the definition of crimes against peace contained in the two charters may be due to the fact that Nazi Germany initiated and waged various aggressive wars in the absence of any declaration of war. The United Nations War Crimes Commission concluded that the differences in the definition contained in the two

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[302] Ibid., pp. 1109-1110.

[303] Special Proclamation: Establishment of an International Military Tribunal for the Far East, annexed to the Judgment of the International Military Tribunal for the Far East, 4-12 November 1948 (hereinafter Tokyo Judgment), Annex No. A-4. The Tokyo Tribunal indicated that it was also established pursuant to the Cairo Declaration of 1 December 1943 and the Moscow Conference of 26 December 1945. Tokyo Judgment, p. 2.

[304] Charter of the International Military Tribunal for the Far East, *Trial of Japanese War Criminals: Documents*, p. 39, Department of State Publication No. 2613, United States Government Printing Office, 1946 (hereinafter Tokyo Charter).

[305] General Assembly resolution 95 (I).

[306] Article 5 of the Tokyo Charter provided as follows:

> "Article 5. *Jurisdiction over persons and offences.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace
>
> "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> "(a) *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"

charters were "purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace in comparison with the Nuremberg Charter."[307] The Commission based its conclusion on the following reasoning:

> "The point raised by the above definition of crimes against peace is that, whereas, the Nuremberg Charter declares the 'waging of a war of aggression' to be a criminal act without making reference to, or drawing a distinction between wars launched with or without a proper 'declaration', the Far Eastern Charter specifically treats as criminal the 'waging of a declared or undeclared war of aggression'.
>
> "The effect of the latter definition is to make it expressly clear that to precede the initiation of war by its formal declaration, as required by the Hague Conventions, does not deprive such a war of its criminal nature if it is 'aggressive'.
>
> "In this connection it is important to note that the difference between the two charters is purely verbal, in the sense that article 5(a) of the Far Eastern Charter contains an additional specification which is, however, implied in the definition given in the Nuremberg Charter.
>
> "While omitting to state that a 'declared' war of aggression is criminal in the same way as an 'undeclared' war, the Nuremberg Charter nevertheless regards as decisive the fact that a war was 'aggressive'. From this it follows that any other element linked up with the 'aggression'— such as the existence or non-existence of a declaration — is to be regarded as incidental, and as irrelevant for the criminal nature of the aggressive war in itself. In other words, the element of 'aggression' is made essential, but is at the same time in itself sufficient.
>
> "Consequently, all we are confronted with here is a difference in legal technique; in the Far Eastern Charter the irrelevance of a 'declaration' of war is established in express terms; in the Nuremberg Charter the same result is achieved by way of omission.
>
> "In this connection it is convenient to point out that it is precisely in the *irrelevance* of a declaration of war that lies the main feature of the development of international law as formulated by the two charters and as established by the judgement of the Nuremberg Tribunal."[308]

C. The indictment

270. The Tokyo Charter provided that the Chief of Counsel, designated by the Supreme Commander, would be responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of the Tokyo Tribunal. Any "United Nation with which Japan had been at war" could also appoint an Associate Counsel to assist the Chief of Counsel in the performance of these functions.[309]

271. The indictment submitted to the Tokyo Tribunal on 29 April 1946 contained three groups of charges consisting of 55 counts against 28 accused, with 52 of the counts relating to crimes against peace. Group one contained counts 1 to 36 concerning crimes against peace, and group two contained counts 37 to 52 concerning acts of murder as crimes against peace, war crimes and crimes against humanity.[310] The Tokyo

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[307] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, p. 259.

[308] Ibid., p. 258.

[309] Tokyo Charter, art. 8.

[310] Group three contained Counts 53 to 55 concerning other conventional war crimes and crimes against humanity. International Military Tribunal for the Far East, No. 1, The United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zealand, India, and the Commonwealth of the Philippines against Araki, Sadao; Dohihara, Kenji; Hashimoto, Kingoro; Hata, Shunroku; Hiranuma, Kiichiro; Hirota, Koki; Hoshino, Naoki; Itagaki, Seishiro; Kaya, Okinori; Kido, Koichi; Kimura, Heitaro; Koiso, Kuniaki; Matsui, Iwane; Matsuoka, Yosuke; Minami, Jiro; Muto, Akira; Nagano, Osami; Oka, Takasumi; Okawa, Shumei; Oshima, Hiroshi; Sato, Kenryo; Shigemitsu, Mamoru; Shimada, Shigetaro; Shiratori, Toshio; Suzuki, Teiichi; Togo, Shigenori; Tojo, Hideki; Umezu, Yoshijiro, Accused. *Trial of Japanese War Criminals: Documents*, Department of State Publication No. 2613, United States Government Printing Office, 1946, p. 45 [hereinafter Tokyo Indictment]. The indictment also included several appendixes relating to the charges of crimes against peace, namely: Appendix A containing more detailed information concerning the allegations of aggressive

Tribunal did not render a verdict on the charges against 3 of the 28 accused, namely, Matsuoka and Nagano, who died during the trial, and Okawa, who was declared unfit to stand trial and unable to defend himself.[311] All of the accused who were before the Tribunal entered pleas of not guilty.[312]

272. The indictment alleged that the internal and foreign policies of Japan "were dominated and directed by a criminal, militaristic clique, and such policies were the cause of ... aggressive wars"; the parliamentary institutions in Japan were used as implements for widespread aggression; a system similar to those of the Nazi Party in Germany and the Fascist Party in Italy were introduced; and the economic and financial resources of Japan were mobilized for war aims.[313]

273. The indictment also alleged that there was a conspiracy among the accused, joined by the rulers of Nazi Germany and Fascist Italy, the main objects of which were, inter alia, "to secure the domination and exploitation by the aggressive States of the rest of the world, and to this end to commit, or encourage the commission of, crimes against peace". In pursuance of this scheme, the accused allegedly, by taking advantage of their power, their official positions and their personal prestige and influence, "intended to and did plan, prepare, initiate and wage aggressive war" against the United States, China, the United Kingdom, the Soviet Union, Australia, Canada, France, the Netherlands, New Zealand, India, the Philippines and other peaceful nations, in violation of international law, treaty commitments, obligations and assurances.[314]

274. The indictment further alleged that in furthering this scheme the accused, inter alia, increased the influence and control of the military and navy over Japanese government officials and agencies; psychologically prepared Japanese public opinion for aggressive warfare by establishing "Assistance Societies", teaching nationalistic policies of expansion, disseminating war propaganda and strictly controlling the press and radio; and concluded military alliances with Germany and Italy to enhance by military might Japan's expansion programme.[315]

1. Group one

275. Counts 1 to 36 concerned the individual responsibility of the accused for crimes against peace under article 5 of the Tokyo Charter and international law. Counts 1 to 5 addressed the common plan or conspiracy to commit crimes against peace; counts 6 to 17 addressed the planning and preparation of wars of aggression; counts 18 to 26 addressed the initiation of wars of aggression; and counts 27 to 36 addressed the waging of wars of aggression.

(a) Counts 1 to 5: The common plan or conspiracy to commit crimes against peace

276. Counts 1 to 5 alleged that all the accused, together with other persons, participated as leaders, organizers, instigators or accomplices in formulating or executing a common plan or conspiracy, between 1 January 1928 and 2 September 1945:[316]

(a) Count 1: to secure for Japan "the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose";[317]

(b) Count 2: to secure for Japan "the military, naval, political and economic domination of the provinces of Liaoning, Kirin, Heilungkiang and Jehol, being parts of the Republic of China, either directly or by establishing a separate State under the control of Japan, and for that purpose they conspired that Japan should wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against the Republic of China";[318]

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wars; Appendix B containing a list of treaty provisions allegedly violated by Japan; Appendix C containing a list of official assurances allegedly violated by Japan; and Appendix E containing a statement of the alleged individual responsibility of the accused for the crimes set out in the indictment.

[311] Tokyo Judgment, p. 12.

[312] Ibid.

[313] Ibid., pp. 45-46.

[314] Ibid., p. 46.

[315] Ibid., pp. 46-47.

[316] Ibid., pp. 47-49.

[317] Ibid., p. 47.

[318] Ibid., p. 48.

(c) Count 3: to secure for Japan "the military, naval, political and economic domination of the Republic of China, either directly or by establishing a separate State or States under the control of Japan, and for that purpose they conspired that Japan should wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against the Republic of China";[319]

(d) Count 4: to secure for Japan "the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances against the United States of America, the British Commonwealth of Nations (which expression wherever used in this Indictment includes the United Kingdom of Great Britain and Northern Ireland, the Commonwealth of Australia, Canada, New Zealand, South Africa, India, Burma, the Malay States and all other parts of the British Empire not separately represented in the League of Nations), the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand (Siam), the Commonwealth of the Philippines and the Union of Soviet Socialist Republics, or such of them as might oppose that purpose";[320]

(e) Count 5: to secure for Germany, Italy and Japan "the military, naval, political and economic domination of the whole world, each having special domination in its own sphere, the sphere of Japan covering East Asia, the Pacific and Indian oceans and all countries bordering thereon and islands therein, and for that purpose they conspired that Germany, Italy and Japan should mutually assist one another to wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any countries which might oppose that purpose, and particularly against the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand (Siam), the Commonwealth of the Philippines, and the Union of Soviet Socialist Republics."[321]

(b) Counts 6 to 17: Planning and preparing for an aggressive war

277. Counts 6 to 17 alleged that all the accused planned and prepared wars of aggression and wars in violation of international law, treaties, agreements and assurances against: China, the United States, the United Kingdom and all parts of the British Commonwealth not the subject of specific counts in the indictment, Australia, New Zealand, Canada, India, the Philippines, the Netherlands, France, Thailand and the Soviet Union, between 1 January 1928 and 2 September 1945.[322]

(c) Counts 18 to 26: Initiating an aggressive war

278. Counts 18 to 26 alleged that some or all of the accused participated in the initiation of wars of aggression and wars in violation of international law, treaties, agreements and assurances against various countries:

(a) Count 18: The accused Araki, Dohihara, Hashimoto, Hiranuma, Itagaki, Koiso, Minami, Okawa, Shigemitsu, Tojo and Umezu were charged with initiating such a war against China on or about 18 September 1931;[323]

(b) Count 19: The accused Araki, Dohihara, Hashimoto, Hata, Hiranuma, Hirota, Hoshino, Itagaki, Kaya, Kido, Matsui, Muto, Suzuki, Tojo and Umezu were charged with initiating such a war against China on or about 7 July 1937;[324]

(c) Counts 20 to 22 and 24: The accused Dohihara, Hiranuma, Hirota, Hoshino, Kaya, Kido, Kimura, Muto, Nagano, Oka, Oshima, Sato, Shimada, Suzuki, Togo and Tojo were charged with initiating such wars against the United States, the Philippines, the British Commonwealth and Thailand on or about 7 December 1941;[325]

(d) Count 23: The accused Araki, Dohihara, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Muto, Nagano, Shigemitsu and Tojo were charged with initiating such a war against France on or about 22 September 1940;[326]

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[319] Ibid.

[320] Ibid., pp. 48-49.

[321] Ibid., p. 49.

[322] Ibid., pp. 49-52.

[323] Ibid., p. 52.

[324] Ibid.

[325] Ibid., pp. 52-53.

(e) Count 25: The accused Araki, Dohihara, Hata, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Matsui, Shigemitsu, Suzuki and Togo were charged with initiating such a war by attacking the Soviet Union in the area of Lake Khasan during July and August 1938;[327]

(f) Count 26: The accused Araki, Dohihara, Hata, Hiranuma, Itagaki, Kido, Koiso, Matsui, Matsuoka, Muto, Suzuki, Togo, Tojo and Umezu were charged with initiating such a war by attacking Mongolia in the area of the Khackhin-Gol River during the summer of 1939.[328]

(d) Counts 27 to 36: Waging an aggressive war

279. Counts 27 to 36 alleged that some or all of the accused participated in waging wars of aggression and wars in violation of international law, treaties, agreements and assurances against various countries:

(a) Counts 27 to 32 and 34: All of the accused were charged with waging such a war against China between 18 September 1931 and 2 September 1945 and between 7 July 1937 and 2 September 1945; and against the United States, the Philippines, the British Commonwealth, the Netherlands and Thailand between 7 December 1941 and 2 September 1945;[329]

(b) Count 33: The accused Araki, Dohihara, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Muto, Nagano, Shigemitsu and Tojo were charged with waging such a war against France on and after 22 September 1940;[330]

(c) Count 35: The same accused as in count 25 were charged with waging such a war against the Soviet Union during the summer of 1938;[331]

(d) Count 36: The same accused as in count 26 were charged with waging such a war against Mongolia and the Soviet Union during the summer of 1939.[332]

2. Group two

280. Counts 37 to 52 concerned the individual responsibility of the accused for conspiracy to commit murder and the actual unlawful killings or murders as, inter alia, crimes against peace.

(a) Counts 37 and 38: The common plan or conspiracy to commit murder as a crime against peace

281. Counts 37 and 38 addressed the charges relating to a common plan or conspiracy to commit murder as a crime against peace: The accused Dohihara, Hiranuma, Hirota, Hoshino, Kaya, Kido, Kimura, Matsuoka,[333] Muto, Nagano, Oka, Oshima, Sato, Shimada, Suzuki, Togo and Tojo, together with other persons, allegedly participated as leaders, organizers, instigators or accomplices in formulating or executing a common plan or conspiracy to unlawfully kill and murder civilians and members of the armed forces of the United States, the Philippines, the British Commonwealth, the Netherlands and Thailand by initiating unlawful hostilities against those countries and by unlawfully ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of those countries or some of them, with which Japan was at peace, between 1 June 1940 and 8 December 1941. The armed forces of Japan did not acquire the rights of lawful belligerents because the unlawful hostilities and attacks violated treaty obligations and the accused intended that the hostilities should be initiated in violation thereof or were reckless as to whether there would be such a violation.[334]

(b) Counts 39 to 43 and 45 to 52: Murder as a crime against peace

282. Counts 39 to 43 and 45 to 52 addressed the charges relating to the actual unlawful killings or murders as crimes against peace, as follows.

283. Counts 39 to 43: The accused Dohihara, Hiranuma, Hirota, Hoshino, Kaya, Kido, Kimura, Matsuoka, Muto, Nagano, Oka, Oshima, Sato, Shimada, Suzuki, Togo and Tojo, allegedly:

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[326] Ibid., p. 53.

[327] Ibid.

[328] Ibid., p. 54.

[329] Ibid., pp. 54-55.

[330] Ibid., p. 55.

[331] Idem.

[332] Idem.

[333] Matsuoka was not charged with conspiracy to commit murder under Count 37 which included the additional element of attacks against countries at peace with Japan and concerned breaches of different treaty provisions, as compared to the similar conspiracy charges contained in Count 38.

[334] Tokyo Indictment, pp. 56-57.

(a) Count 39: unlawfully killed and murdered civilians and about 4,000 members of the armed forces of the United States, including Admiral Kidd, by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the United States at Pearl Harbor on 7 December 1941, when the United States was at peace with Japan;[335]

(b) Counts 40 to 42: unlawfully killed and murdered members of the armed forces of the British Commonwealth by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the British Commonwealth at Kota Bahru, Kelantan, Hong Kong and Shanghai, on 8 December 1941, when such nations were at peace with Japan;[336]

(c) Count 43: unlawfully killed and murdered members of the armed forces of the United States and civilians and members of the armed forces of the Philippines by ordering, causing and permitting the armed forces of Japan to attack the territory of the Philippines on 8 December 1941, when the Philippines was at peace with Japan.[337]

284. Counts 45 to 47: The accused Araki, Hashimoto, Hata, Hiranuma, Hirota, Itagaki, Kaya, Kido, Matsui, Muto, Suzuki and Umezu allegedly:

(a) Count 45: unlawfully killed and murdered many thousands of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the city of Nanking in breach of treaty obligations and to slaughter the inhabitants contrary to international law on and after 12 December 1937;[338]

(b) Count 46: unlawfully killed and murdered large numbers of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the city of Canton in breach of treaty obligations and to slaughter the inhabitants contrary to international law on and after 21 October 1938;[339]

(c) Count 47: unlawfully killed and murdered large numbers of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the city of Hankow in breach of treaty obligations and to slaughter the inhabitants contrary to international law before and after 27 October 1938.[340]

285. Counts 48 to 50: The accused Hata, Kido, Koiso, Sato, Shigemitsu, Tojo and Umezu allegedly:

(a) Count 48: unlawfully killed and murdered many thousands of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the city of Changsha in breach of treaty obligations and to slaughter the inhabitants contrary to international law before and after 18 June 1944;[341]

(b) Count 49: unlawfully killed and murdered large numbers of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the city of Hengyang in Hunan Province in breach of treaty obligations and to slaughter the inhabitants contrary to international law before and after 8 August 1944;[342]

(c) Count 50: unlawfully killed and murdered large numbers of civilians and disarmed soldiers of China by unlawfully ordering, causing and permitting the armed forces of Japan to attack the cities of Kweilin and Liuchow in Kwangsi Province in breach of treaty obligations and to slaughter the inhabitants contrary to international law before and after 10 November 1944.[343]

286. Count 51: The accused Araki, Dohihara, Hata, Hiranuma, Itagaki, Kido, Koiso, Matsui, Matsuoka, Muto, Suzuki, Togo, Tojo and Umezu were charged with unlawfully killing and murdering members of the armed forces of Mongolia and the Soviet Union by ordering, causing and permitting the armed forces of Japan to attack the territories of Mongolia and the Soviet Union, which were at peace with Japan, in the region of the Khalkhin-Gol River in the summer of 1939.[344]

287. Count 52: The accused Araki, Dohihara, Hata, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Matsui, Shigemitsu, Suzuki and Tojo were charged with unlawfully killing and murdering members of the armed forces of the Soviet Union by ordering, causing and permitting the armed forces of Japan to attack the territory of the Soviet Union, which was at peace with

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[335] Ibid., p. 57.

[336] Ibid., pp. 57-58.

[337] Ibid., p. 58.

[338] Ibid., pp. 58-59.

[339] Ibid., p. 59.

[340] Idem.

[341] Idem.

[342] Idem.

[343] Tokyo Indictment, pp. 59-60.

[344] Ibid., p. 60.

Japan, in the region of Lake Khasan during July and August 1938.[345]

D. The judgement

1. Aggressive war as a crime under international law

288. The Tokyo Tribunal rejected the arguments put forward by the defence that there was no authority for including crimes against peace within its jurisdiction, that aggressive war was not per se illegal or a crime, that war was an act of State for which there was no individual responsibility under international law, and that the Charter provisions were ex post facto legislation and therefore illegal.[346] The Tokyo Tribunal expressed its complete agreement with the opinion of the Nuremberg Tribunal on these issues in reaching its own conclusion that "aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam".[347]

2. The indictment

(a) Multiplicity of charges

289. The Tokyo Tribunal noted that the Tokyo Charter included five separate crimes under the heading of crimes against peace, namely, planning, preparation, initiation and waging aggressive war or war in violation of international law, treaties, agreements or assurances, as well as participating in a common plan or conspiracy to accomplish any of the above. The Tribunal also pointed out that the indictment contained 55 counts against some or all of the 25 defendants constituting 756 separate charges, some of which were cumulative or alternative charges. The Tribunal therefore reduced the number of charges that it would consider.[348]

(b) Relationship between the charges of planning and conspiring to wage aggressive war

290. The Tokyo Tribunal emphasized the close relationship between the charges relating to planning an aggressive or unlawful war and participating in a common plan or conspiracy to do so. It therefore decided not to consider the counts relating to planning in relation to any accused convicted of conspiracy for the following reasons:

> "A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfilment, they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges, we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive."[349]

(c) Relationship between the charges relating to initiating and waging an aggressive war

291. The Tokyo Tribunal also emphasized the close relationship between the charges relating to initiating and waging an aggressive war and decided not to consider the former charges contained in counts 18 to 26 for the following reasons:

> "A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders, others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose therefore to abstain from consideration of counts 18 to 26 inclusive."[350]

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[345] Idem.

[346] Tokyo Judgment, pp. 23-24.

[347] Ibid., pp. 25-27.

[348] Ibid., pp. 32, 34-35.

[349] Ibid., pp. 32-33.

[350] Ibid., p. 33.

(d) The charges of murder as a crime against peace

292. In addition, the Tokyo Tribunal decided not to consider any of the charges relating to murder as a crime against peace. The Tribunal concluded that it did not have jurisdiction to consider the charges relating to conspiracy to commit murder by waging an aggressive war contained in counts 37 and 38 because that crime was not included in the Tokyo Charter.[351] It further concluded that there was no reason to consider the charges relating to murder as a crime against peace contained in counts 39 to 43, 51 and 52 since the same issues were before it under the charges relating to waging aggressive war:

> "In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified treaty articles (counts 45 to 50). If, in any case, the finding be that the war was not unlawful, then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful, then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theatre of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging these wars unlawfully is put in issue upon the counts charging the waging of such wars."[352]

3. Military domination of Japan and the planning and preparation for aggressive war

293. In its judgement, the Tokyo Tribunal included a lengthy and detailed account of the military domination of Japan, the development and formulation of the military's aggressive plans and policies, and the preparation of the country for war. The Tribunal traced the gradual rise of the military to such a predominance in the Government of Japan that no other organ of government could impose an effective check on the aggressive ambitions of the military. It also traced the preparation of virtually every segment of Japanese society for war, including the military, the civilian population, the educational system, the media, the economy and the essential industries.[353]

294. The Tribunal discussed in great detail the changes in the high-level government officials of the Japanese Government and the consequential changes in government policies. The Tribunal, however, concluded that the fundamental aggressive aim of Japan remained constant throughout the years of planning and preparation for the subsequent acts of aggression:

> "Notwithstanding frequent changes in policy and administration, it had throughout been Japan's aim to establish her dominion over the countries and territories of East Asia and the South Seas."[354]

(a) The Tripartite Alliance

295. The Tribunal attributed particular importance to the conclusion of the Tripartite Alliance between Germany, Italy and Japan on 27 September 1940 as a necessary step in preparing for Japan's aggressive actions and as a clear indication of the aggressive aims of those countries:

> "The Tripartite Alliance was concluded as a necessary step in Japanese preparations for a military advance into South-East Asia and the South Seas. At the numerous discussions and conferences of September 1940, it was recognized by all who took part that the conclusion of the alliance would commit Japan to waging war against France, the Netherlands and the countries of the British Commonwealth; and that it implied also Japan's willingness to wage war against the United States, should that country seek to stand between Japan and the attainment of her aggressive aims.
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> "...
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> "The obligation of the contracting powers to support one another were represented as arising only if an attack was made upon one or more of their number. Nevertheless, the whole tenor of the discussions before the Privy Council [of Japan] and elsewhere shows clearly that the three powers were determined to support one another in aggressive action whenever such action was

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[351] Ibid., p. 34.

[352] Ibid., p. 36.

[353] Ibid., pp. 83-520.

[354] Ibid., p. 468.

> considered necessary to the furtherance of their schemes.
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> “...
>
> “In summary, the Tripartite Pact was a compact made between aggressor nations for the furtherance of their aggressive purposes.”[355]

(b) Conclusion

296. The Tribunal concluded its discussion of the planning and preparation for aggressive war as follows:

> “The decisions of the leaders of Japan ... are of outstanding importance, and have therefore been set forth in detail. They show that the conspirators were determined to extend the domination of Japan over a huge area and population and to use force, if necessary, to accomplish their aims. They show by plain admission that the purpose of the conspirators in entering into the Tripartite Pact was to secure support for the accomplishment of these illegal aims. They show that notwithstanding the seeming defensive terms of the Tripartite Pact, which were designed for publication, the obligations of the parties to support one another were expected to come into force if one of the parties became engaged in war whether defensive or aggressive. They wholly refute the contention of the defence that the purpose of the Tripartite Pact was to promote the cause of peace.
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> “The conspirators now dominated Japan. They had fixed their policy and resolved to carry it out. While the aggressive war in China was continuing with undiminished vigour, their preparations for further wars of aggression which its execution would almost certainly involve were far on the way to completion. In the chapter of the judgment which deals with the Pacific War, we shall see these preparations completed and the attacks launched which the conspirators hoped would secure for Japan the domination of the Far East.”[356]

4. Counts 1 to 5: The common plan or conspiracy to commit wars of aggression

(a) The object or purpose of the common plan or conspiracy to wage aggressive war

297. The Tokyo Tribunal first considered count 1, under which all of the accused, together with other persons, were charged with participating in the formulation or execution of a common plan or conspiracy to secure for Japan the military, naval, political and economic domination of East Asia, the Pacific and Indian oceans as well as all countries and islands therein or bordering thereon; and, for that purpose, alone or with other countries having similar objects, to wage a war or wars of aggression against any countries opposing that purpose. While noting that some of the alleged participants in the conspiracy undoubtedly made declarations coinciding with that grandiose purpose, the Tokyo Tribunal was of the opinion that those declarations were no more than the aspirations of individuals and the conspirators never seriously resolved to dominate North and South America. The Tokyo Tribunal therefore limited the object of the conspiracy in count 1 as follows:

> “So far as the wishes of the conspirators crystallized into a concrete common plan, we are of the opinion that the territory they had resolved that Japan should dominate was confined to East Asia, the Western and South-western Pacific Ocean and the Indian Ocean, and certain islands in these oceans.”[357]

298. The Tribunal concluded that a common plan or conspiracy with this limited purpose in fact existed based on the following considerations. First, before 1928, Okawa, one of the original defendants discharged from trial because of his mental state, had publicly advocated the extension of Japanese territory on the Asian continent by threat, or if necessary, by military force; further advocated the domination of Eastern Siberia and the South Sea Islands; and predicted that Japan would be victorious in the resulting war between East and West. The Japanese General Staff supported this plan, which was consistent with subsequent declarations of other conspirators. Second, from 1927 to 1929, when Tanaka was premier, part of the military and civilian supporters advocated Okawa's policy of expansion by the use of force. The Tokyo Tribunal

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[355] Ibid., pp. 517-519.

[356] Ibid., p. 520.

[357] Ibid., p. 1137.

concluded that the conspiracy existed at this point and continued until the end of the war.[358]

(b) Tactics used by the conspirators

299. The Tokyo Tribunal noted that there was a struggle between the conspirators who advocated Japan's expansion by force and those politicians and bureaucrats who advocated Japan's expansion by peaceful measures or at least a more selective use of force. The Tribunal reviewed the tactics used by the conspirators to gain control of the Japanese polity:

> "This struggle culminated in the conspirators obtaining control of the organs of government of Japan and preparing and regimenting the nation's mind and material resources for wars of aggression designed to achieve the object of the conspiracy. In overcoming the opposition the conspirators employed methods which were entirely unconstitutional and at times wholly ruthless. Propaganda and persuasion won many to their side, but military action abroad without Cabinet sanction or in defiance of Cabinet veto, assassination of opposing leaders, plots to overthrow by force of arms Cabinets which refused to cooperate with them, and even a military revolt which seized the capital and attempted to overthrow the Government were part of the tactics whereby the conspirators came ultimately to dominate the Japanese polity."[359]

(c) The war against China

300. The Tokyo Tribunal found that, once the conspirators had overcome all opposition at home, they carried out in succession the attacks necessary to achieve their ultimate objective of dominating the Far East, beginning with attacks on China:

> "In 1931, they launched a war of aggression against China and conquered Manchuria and Jehol. By 1934, they had commenced to infiltrate into North China, garrisoning the land and setting up puppet governments designed to serve their purposes. From 1937 onwards, they continued their aggressive war against China on a vast scale, overrunning and occupying much of the country, setting up puppet governments on the above model, and exploiting China's economy and natural resources to feed the Japanese military and civilian needs."[360]

(d) Japan's alliance with Germany and Italy

301. The Tokyo Tribunal also found that the conspirators entered into alliances with Germany and Italy, who had similar aggressive policies, to obtain their diplomatic and military support after Japan's actions with respect to China had drawn the condemnation of the League of Nations and left Japan "friendless in the councils of the world".[361]

(e) The wars against the Soviet Union, the United States, the British Commonwealth, France and the Netherlands

302. The Tokyo Tribunal reviewed Japan's planning, preparing and waging of aggressive wars against other countries:

> "In the meantime they had long been planning and preparing a war of aggression which they proposed to launch against the USSR. The intention was to seize that country's Eastern territories when a favourable opportunity occurred. They had also long recognized that their exploitation of East Asia and their designs on the islands in the Western and South-western Pacific would bring them into conflict with the United States of America, Britain, France and the Netherlands, who would defend their threatened interests and territories. They planned and prepared for war against these countries also.
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> "...
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> "Their proposed attack on the USSR was postponed from time to time for various reasons, among which were (a) Japan's preoccupation with the war in China, which was absorbing unexpectedly large military resources, and (b) Germany's pact of non-aggression with the USSR in 1939, which for the time freed the USSR from threat of attack on her western frontier, and might have allowed her to devote the bulk of her strength to the defence of her Eastern territories if Japan had attacked her.
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> "Then in the year 1940 came Germany's great military successes on the continent of Europe. For the time being Great Britain, France

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[358] Ibid., p. 1138.

[359] Ibid., p. 1139.

[360] Ibid., pp. 1139-1140.

[361] Ibid., p. 1140.

> and the Netherlands were powerless to afford adequate protection to their interests and territories in the Far East. The military preparations of the United States were in the initial stages. It seemed to the conspirators that no such favourable opportunity could readily recur of realizing that part of their objective which sought Japan's domination of South-West Asia and the islands in the Western and South-western Pacific and Indian oceans. After prolonged negotiations with the United States of America, in which they refused to disgorge any substantial part of the fruits they had seized as the result of their war of aggression against China, on 7 December 1941, the conspirators launched a war of aggression against the United States and the British Commonwealth. They had already issued orders declaring that a state of war existed between Japan and the Netherlands as from 00.00 hours on 7 December 1941. They had previously secured a jumping-off place for their attacks on the Philippines, Malaya and the Netherlands East Indies by forcing their troops into French Indo-China under threat of military action if this facility was refused them. Recognizing the existence of a state of war and faced by the imminent threat of invasion of her Far Eastern territories, which the conspirators had long planned and were now about to execute, the Netherlands in self-defence declared war on Japan."[362]

(f) The criminal nature of the common plan or conspiracy to wage aggressive war and the criminal responsibility of the participants

303. After reviewing the aggressive policies and actions of Japan, the Tokyo Tribunal addressed the criminal nature of the common plan or conspiracy and the general responsibility of the participants:

> "These far-reaching plans for waging wars of aggression, and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object. That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.
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> "...
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> "The conspiracy existed for and its execution occupied a period of many years. Not all of the conspirators were parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in count 1."[363]

(g) The common plan or conspiracy to wage wars in violation of international law, treaties, agreements and assurances

304. The Tokyo Tribunal found it unnecessary to consider whether there was also a common plan or conspiracy to wage wars in violation of international law, treaties, agreements and assurances, since "the conspiracy to wage wars of aggression was already criminal in the highest degree".[364] The Tribunal also found it unnecessary to consider the alleged conspiracies under counts 2 and 3, which had more limited objectives than count 1, or count 4 which charged the same conspiracy as count 1 with more specifications. The Tribunal further found that the alleged conspiracy in count 5 was even wider and more grandiose in its object than count 1 and that there was insufficient evidence of such a conspiracy notwithstanding the individual aspirations of some of the participants.[365]

5. Counts 27 to 36: Waging aggressive wars

305. The Tokyo Tribunal included a lengthy and detailed statement of the relevant facts and circumstances relating to each of the alleged wars of aggression. The Tribunal ultimately concluded that

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[362] Ibid., pp. 1140-1141.

[363] Ibid., pp. 1141-1143.

[364] Ibid., p. 1142. Earlier in its judgement, the Tokyo Tribunal reviewed the relevant obligations assumed and the rights acquired by Japan. Ibid., p. 38.

[365] Ibid., pp. 1142-1143.

Japan had waged wars of aggression against all of the countries named in the indictment (counts 27, 29, 31, 32, 33, 35 and 36) except the Philippines (count 30) and Thailand (count 34). The Tribunal found it unnecessary to consider the charges of waging aggressive war against China for a lesser period of time in count 28 after holding that the fuller charge contained in count 27 had been proved.[366]

(a) The charges of waging wars in violation of international law, treaties, agreements or assurances and the charges of murder

306. As with respect to the conspiracy charge, the Tokyo Tribunal concluded that it was sufficient to consider the charge of waging aggressive wars without going into the question of whether the wars also violated international law, treaties, agreements or assurances. The Tribunal also reiterated its decision not to consider the charges relating to murder. The Tribunal observed:

> "Under the Charter of the Tribunal the planning, preparation, initiation or waging of a war in violation of international law, treaties, agreements or assurances is declared to be a crime. Many of the charges in the Indictment are based wholly or partly upon the view that the attacks against Britain and the United States were delivered without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. For reasons which are discussed elsewhere we have decided that it is unnecessary to deal with these charges. In the case of counts of the Indictment which charge conspiracy to wage aggressive wars and wars in violation of international law, treaties, agreements or assurances, we have come to the conclusion that the charge of conspiracy to wage aggressive wars has been made out, that these acts are already criminal in the highest degree, and that it is unnecessary to consider whether the charge has also been established in respect of the list of treaties, agreements and assurances — including Hague Convention No. III — which the Indictment alleges to have been broken. We have come to a similar conclusion in respect to the counts which allege the waging of wars of aggression and wars in violation of international law, treaties, agreements and assurances. With regard to the counts of the Indictment which charge murder in respect that wars were waged in violation of Hague Convention No. III of 1907 or of other treaties, we have decided that the wars in the course of which these killings occurred were all wars of aggression. The waging of such wars is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by convicting any defendant of that major crime and also of 'murder' *eo nomine*. Accordingly it is unnecessary for us to express a concluded opinion upon the exact extent of the obligation imposed by Hague Convention No. III of 1907.[367] It undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced, but it does not define the period which must be allowed between the giving of this warning and the commencement of hostilities. The position was before the framers of the Convention and has been the subject of controversy among international lawyers ever since the Convention was made."[368]

(b) The war against China

307. Turning first to the Japanese aggression against China,[369] the Tokyo Tribunal described the broad outlines of the war in China:

> "The war which Japan waged against China, and which the Japanese leaders falsely described as the 'China Incident' or the 'China Affair', began on the night of 18 September 1931 and ended with the surrender of Japan in Tokyo Bay on 2 September 1945. The first phase of this war consisted of the invasion, occupation and consolidation by Japan of that part of China known as Manchuria, and of the province of Jehol. The second phase of this war began on 7 July 1937, when Japanese troops attacked the walled city of Wanping near Peiping following the 'Marco Polo Bridge Incident', and consisted of successive advances, each followed by brief

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[366] Ibid., pp. 1143-1144.

[367] The Tribunal noted that "Hague Convention No. III of 1907, relative to the opening of hostilities, provides by its first article 'The Contracting Parties recognize that hostilities between themselves must not commence without previous and explicit warning in the form of either a reasoned declaration of war or an ultimatum with conditional declaration of war.' That Convention was binding on Japan at all relevant times." Ibid., p. 986.

[368] Ibid., pp. 986-987.

[369] Ibid., p. 521.

> periods of consolidation in preparation for further advances into Chinese territory."[370]

308. The Tribunal continued with a lengthy and detailed statement of the facts relating to Japan's aggressive war against China, including the objectives of territorial expansion, colonization and the exploitation of the resources of China; various armed incidents used as pretexts for military action; false assurances and false claims of self-defence; violations of various international agreements; disregard of efforts by the League of Nations and others to reach a negotiated settlement; interference in internal affairs and the installation of puppet regimes; and extensive illicit trafficking in opium and narcotics to weaken resistance and to finance Japan's operations.[371]

(c) The war against the Soviet Union

309. Turning to the war against the Soviet Union,[372] the Tokyo Tribunal considered Japan's long-standing intention to wage aggressive war against that country:

> "Throughout the period covered by the evidence tendered to the Tribunal, the intention to undertake a war against the USSR has been shown to have been one of the basic elements of Japan's military policy. The military party was determined to establish Japan in occupation of the Far Eastern territories of the USSR, as well as in other parts of the continent of Asia. Although the seizure of Manchuria (the three north-eastern provinces of China) was attractive for its natural resources and for expansion and colonization, it was desirable also as a point of approach in the intended war against the USSR."[373]

310. The Tribunal rejected the argument that the object of Japan's actions against the USSR was defence against communism rather than the occupation of Far Eastern Siberia.[374] In that regard, the Tribunal noted that Japan undertook extensive preparations for war against the Soviet Union which were clearly offensive ("attacking the Soviet Union with the object of seizing part of its territories"[375]) although carried out under a defensive pretence;[376] that the Anti-Comintern Pact signed by Japan and Germany in 1936, and later adhered to by Italy in 1937, was directed primarily against the USSR and included a secret agreement creating a limited military and political alliance against that country;[377] that the Soviet Union was of special concern to Japan in negotiating the 1940 Tripartite Pact;[378] and that Japan aided Germany after it invaded the USSR in June 1941 contrary to the April 1941 neutrality pact between Japan and the USSR which Japan never intended to respect.[379] The Tribunal concluded:

> "The Tribunal is of the opinion that a war of aggression against the USSR was contemplated and planned throughout the period under consideration, that it was one of the principal elements of Japan's national policy and that its object was the seizure of territories of the USSR in the Far East."[380]

311. The Tribunal also noted Japan's aggressive plans and military policy with respect to the Soviet Union, which could not be characterized as "strategic-defensive";[381] Japan's detailed plans for control of the occupied Soviet territories;[382] its active preparations for war after Germany attacked the Soviet Union;[383] its large concentration of troops deployed in Manchuria along the Soviet border;[384] and its elaborate plans for acts of subversion and sabotage against the USSR.[385] The Tribunal concluded that, until 1943, "Japan not only planned to wage a war of aggression against the

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[370] Idem.

[371] Tokyo Judgment, pp. 521-775.

[372] Ibid., p. 776.

[373] Idem.

[374] Tokyo Judgment, p. 777.

[375] Ibid., p. 783.

[376] Ibid., pp. 782-785.

[377] Ibid., pp. 785-789.

[378] Ibid., pp. 790-792.

[379] Ibid., pp. 792, 818-823. "It would appear that Japan was not sincere in concluding the Neutrality Pact with the USSR, but considering her agreements with Germany more advantageous, she signed the Neutrality Pact to facilitate her plans for an attack upon the USSR. Ibid., p. 823. After reviewing Japan's actions with respect to Soviet shipping, including shelling and sinking such ships, the Tribunal concluded that "It has certainly been established that the Neutrality Pact was entered into without candour and as a device to advance Japan's aggressive intentions against the USSR". Ibid., p. 826.

[380] Ibid., p. 803.

[381] Ibid., pp. 807-809.

[382] Ibid., p. 812

[383] Ibid., p. 815.

[384] Ibid., p. 816.

[385] Ibid.

USSR but also that she continued with active preparations for such a war".[386]

312. The Tribunal rejected the defence argument that Japan's military operations against the Soviet Union in the Lake Khassan area and the Nomonhan area were "mere border incidents caused by uncertainty as to the boundaries and resulting in clashes of the opposing frontier guard detachments".[387]

313. With regard to Lake Khassan, the Tribunal concluded that Japan deliberately planned and launched the first attack, there was no evidence that Soviet troops initiated the fighting which would have justified the attack by Japan, and the fighting constituted more than a mere border clash.[388] The Tribunal stated:

> "From the evidence as a whole the Tribunal has come to the conclusion that the attack by the Japanese troops at Lake Khassan was deliberately planned by the General Staff and by Itagaki as Minister of War and was authorized at least by the Five Ministers who participated in the conference of 22 July 1938. The purpose may have been either to feel out the Soviet strength in the area or to seize the strategically important territory on the ridge overlooking the line of communication to Vladivostok and the Maritime Province. The attack, having been planned and undertaken with substantial forces, cannot be regarded as a mere clash between border patrols. That the Japanese initiated the hostilities is also established to the Tribunal's satisfaction. Though the force employed was not very large, the purpose above mentioned and the result if the attack had been successful are sufficient, in the opinion of the Tribunal, to justify describing the hostilities as a war. Furthermore, having regard to the state of international law then existing and the attitude adopted by the Japanese representatives in the preliminary diplomatic negotiations, the operations of the Japanese troops were, in the opinion of the Tribunal, clearly aggressive."[389]

314. The Tribunal reached a similar conclusion with respect to the hostilities in the Nomonhan district from May to September 1939, which were on a much larger scale than the fighting at Lake Khassan.[390] The Tribunal observed:

> "As in the case of the Lake Khassan Incident, the Japanese troops were completely defeated; what would have followed if they had been successful is purely speculative. However, the mere fact that they were defeated does not determine the character of the operations. These operations were on a large scale extending over a period of over four months; they were obviously undertaken by the Japanese after careful preparation, as appears from the Proclamation of the Commander-in-Chief of the 6th Army, and the intention was to exterminate the enemy troops opposing them. The contention that the incident was a mere clash between opposing border guards is therefore untenable. In the circumstances the Tribunal holds that the operations amounted to an aggressive war waged by the Japanese."[391]

315. The Tribunal rejected the defence argument that these actions were condoned in the subsequent agreements between Japan and the USSR settling the Lake Khassan and Nomonhan fighting. The Tribunal observed:

> "In none of the three agreements on which the Defence argument is based was any immunity granted, nor was the question of liability, criminal or otherwise, dealt with. The Tribunal is therefore of the opinion that these agreements afford no defence to the criminal proceedings being taken before this International Tribunal. In a matter of criminal liability, whether domestic or international, it would be against the public interest for any tribunal to countenance condonation of crime either expressly or by implication."[392]

316. The Tribunal also rejected the defence argument that there could be no war as Mongolia was an integral part of China and not a sovereign State until 1945. The Tribunal emphasized Japan's written commitments formally acknowledging the status of the Mongolian People's Republic in observing:

> "In the face of this clear acknowledgement of the sovereign status of Outer Mongolia and in the absence of evidence to the contrary, the Accused [Togo] cannot now be heard to say that

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[386] Ibid., p. 818.

[387] Ibid., p. 827.

[388] Ibid., pp. 828-833.

[389] Ibid., pp. 833-834.

[390] Ibid., pp. 834-840.

[391] Ibid., p. 840.

[392] Ibid., p. 841.

> the point has not been proven, nor can they be heard to say that the Tribunal may take judicial notice of the fact that Outer Mongolia was until 1945 an integral part of the Republic of China."[393]

6. The Pacific War

317. Turning to the Pacific War,[394] the Tokyo Tribunal first considered and rejected the defence argument that the actions of Japan in the Pacific constituted legitimate acts of self-defence in response to economic measures taken by the Western Powers, for the following reasons:

> "It remains to consider the contention advanced on behalf of the defendants that Japan's acts of aggression against France, her attack against the Netherlands and her attacks on Great Britain and the United States of America were justifiable measures of self-defence. It is argued that these Powers took such measures to restrict the economy of Japan that she had no way of preserving the welfare and prosperity of her nationals but to go to war.
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> "The measures which were taken by these Powers to restrict Japanese trade were taken in an entirely justifiable attempt to induce Japan to depart from a course of aggression on which she had long been embarked and upon which she had determined to continue. Thus the United States of America gave notice to terminate the Treaty of Commerce and Navigation with Japan on 26 July 1939 after Japan had seized Manchuria and a large part of the rest of China and when the existence of the treaty had long ceased to induce Japan to respect the rights and interests of the nationals of the United States in China. It was given in order that some other means might be tried to induce Japan to respect these rights. Thereafter the successive embargoes which were imposed on the export of materials to Japan were imposed as it became clearer and clearer that Japan had determined to attack the territories and interests of the Powers. They were imposed in an attempt to induce Japan to depart from the aggressive policy on which she had determined and in order that the Powers might no longer supply Japan with the materials to wage war upon them. In some cases, as for example in the case of the embargo on the export of oil from the United States of America to Japan, those measures were also taken in order to build up the supplies which were needed by the nations who were resisting the aggressors. The argument is indeed merely a repetition of Japanese propaganda issued at the time she was preparing for her wars of aggression. It is not easy to have patience with its lengthy repetition at this date when documents are at length available which demonstrate that Japan's decision to expand to the North, to the West and to the South at the expense of her neighbours was taken long before any economic measures were directed against her and was never departed from. The evidence clearly establishes contrary to the contention of the defence that the acts of aggression against France, and the attacks on Britain, the United States of America and the Netherlands were prompted by the desire to deprive China of any aid in the struggle she was waging against Japan's aggression and to secure for Japan the possessions of her neighbours in the South."[395]

(a) The war against France

318. The Tokyo Tribunal concluded that Japan had waged aggressive war against France based on Japan's demands, its attitude during negotiations and the fighting that Japan initiated when it failed to obtain its objectives by negotiation:

> "The Tribunal is of the opinion that the leaders of Japan in the years 1940 and 1941 planned to wage wars of aggression against France in French Indo-China. They had determined to demand that France cede to Japan the right to station troops and the right to airbases and naval bases in French Indo-China, and they had prepared to use force against France if their demands were not granted. They did make such demands upon France under threat that they would use force to obtain them, if that should prove necessary. In her then situation France was compelled to yield to the threat of force and granted the demands.
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> "The Tribunal also finds that a war of aggression was waged against the Republic of France. The occupation by Japanese troops of portions of French Indo-China, which Japan had forced France to accept, did not remain peaceful. As the war situation, particularly in the Philippines, turned against Japan the Japanese Supreme War Council in February 1945 decided to

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[393] Ibid., p. 842.

[394] Ibid., p. 843.

[395] Ibid., pp. 990-992.

> submit the following demands to the Governor of French Indo-China: (a) that all French troops and armed police be placed under Japanese command, and (b) that all means of communication and transportation necessary for military action be placed under Japanese control. These demands were presented to the Governor of French Indo-China on 9 March 1945 in the form of an ultimatum backed by the threat of military action. He was given two hours to refuse or accept. He refused, and the Japanese proceeded to enforce their demands by military action. French troops and military police resisted the attempt to disarm them. There was fighting in Hanoi, Saigon, Phnom-Penh, Nhatrang and towards the northern frontier. We quote the official Japanese account: 'In the northern frontiers the Japanese had considerable losses. The Japanese army proceeded to suppress French detachments in remote places and contingents which had fled to the mountains. In a month public order was re-established except in remote places.' The Japanese Supreme War Council had decided that, if Japan's demands were refused and military action was taken to enforce them, 'the two countries will not be considered as at war'. This Tribunal finds that Japanese actions at that time constituted the waging of a war of aggression against the Republic of France."[396]

(b) The wars against the United Kingdom, the United States and the Netherlands

319. The Tokyo Tribunal also concluded that Japan had waged aggressive wars against the United Kingdom, the United States and the Netherlands by launching unprovoked armed attacks against those countries with the intention of seizing territory:

> "The Tribunal is further of the opinion that the attacks which Japan launched on 7 December 1941 against Britain, the United States of America and the Netherlands were wars of aggression. They were unprovoked attacks, prompted by the desire to seize the possessions of those nations. Whatever may be the difficulty of stating a comprehensive definition of 'a war of aggression', attacks made with the above motive cannot but be characterized as wars of aggression."[397]

320. The Tribunal rejected the defence argument that Japan could not have waged aggressive war against the Netherlands, which had first declared war on Japan. The Tribunal observed:

> "It was argued on behalf of the defendants that, in as much as the Netherlands took the initiative in declaring war on Japan, the war which followed cannot be described as a war of aggression by Japan. The facts are that Japan had long planned to secure for herself a dominant position in the economy of the Netherlands East Indies by negotiation or by force of arms if negotiation failed. By the middle of 1941, it was apparent that the Netherlands would not yield to the Japanese demands. The leaders of Japan then planned and completed all the preparations for invading and seizing the Netherlands East Indies. The orders issued to the Japanese army for this invasion have not been recovered, but the orders issued to the Japanese navy on 5 November 1941 have been adduced in evidence. This is the Combined Fleet Operations Order No. 1 already referred to. The expected enemies are stated to be the United States, Great Britain and the Netherlands. The order states that the day for the outbreak of war will be given in an Imperial General Headquarters order, and that *after 0000 hours on that day a state of war will exist* and the Japanese forces will commence operations according to the plan. The order of Imperial General Headquarters was issued on 10 November and it fixed 8 December (Tokyo time), 7 December (Washington time) as the date on which a state of war would exist and operations would commence according to the plan. In the very first stage of the operations so to be commenced it is stated that the Southern Area Force would annihilate enemy fleets in the Philippines, British Malaya and the Netherlands East Indies area. There is no evidence that the above order was ever recalled or altered in respect to the above particulars. In these circumstances we find in fact that orders declaring the existence of a state of war and for the execution of a war of aggression by Japan against the Netherlands were in effect from the early morning of 7 December 1941. The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war against Japan on 8 December and thus officially recognized the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression on the part of Japan into something other than that. In fact Japan did not declare war against the

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[396] Ibid., pp. 992-994.

[397] Ibid., p. 994.

Netherlands until 11 January 1942 when her troops landed in the Netherlands East Indies. The Imperial Conference of 1 December 1941 decided that 'Japan will open hostilities against the United States, Great Britain and the Netherlands'. Despite this decision to open hostilities against the Netherlands, and despite the fact that orders for the execution of hostilities against the Netherlands were already in effect, Tojo announced to the Privy Council on 8 December (Tokyo time) when they passed the bill making a formal declaration of war against the United States of America and Britain that war would not be declared on the Netherlands in view of future strategic convenience. The reason for this was not satisfactorily explained in evidence. The Tribunal is inclined to the view that it was dictated by the policy decided in October 1940 for the purpose of giving as little time as possible for the Dutch to destroy oil wells. It has no bearing, however, on the fact that Japan launched a war of aggression against the Netherlands."[398]

(c) The alleged war against Thailand

321. The Tribunal regretted the limited evidence submitted concerning the charge against Japan of waging aggressive war against Thailand and eventually concluded that the charge had not been proved for the following reasons:

> "The position of Thailand is special. The evidence bearing upon the entry of Japanese troops into Thailand is meagre to a fault. It is clear that there was complicity between the Japanese leaders and the leaders of Thailand in the years 1939 and 1940 when Japan forced herself on France as mediator in the dispute as to the border between French Indo-China and Thailand. There is no evidence that the position of complicity and confidence between Japan and Thailand, which was then achieved, was altered before December 1941. It is proved that the Japanese leaders planned to secure a peaceful passage for their troops through Thailand into Malaya by agreement with Thailand. They did not wish to approach Thailand for such an agreement until the moment when they were about to attack Malaya, lest the news of the imminence of that attack should leak out. The Japanese troops marched through the territory of Thailand unopposed on 7 December 1941 (Washington time). The only evidence the prosecution has adduced as to the circumstances of that march is (a) a statement made to the Japanese Privy Council between 10 and 11 a.m. on 8 December 1941 (Tokyo time) that an agreement for the passage of the troops was being negotiated, (b) a Japanese broadcast announcement that they had commenced friendly advancement into Thailand on the afternoon of 8 December (Tokyo time) (Washington time, 7 December) and that Thailand had facilitated the passage by concluding an agreement at 12.30 p.m., and (c) a conflicting statement, also introduced by the prosecution, that Japanese troops landed at Singora and Patani in Thailand at 3.05 in the morning of 8 December (Tokyo time). On 21 December 1941, Thailand concluded a treaty of alliance with Japan. No witness on behalf of Thailand has complained of Japan's actions as being acts of aggression. In these circumstances we are left without reasonable certainty that the Japanese advance into Thailand was contrary to the wishes of the Government of Thailand and the charges that the defendants initiated and waged a war of aggression against the Kingdom of Thailand remain unproved."[399]

(d) The war against the British Commonwealth of Nations

322. While noting the lack of precision in referring to the various countries in the documents submitted in evidence, the Tokyo Tribunal concluded that Japan had waged aggressive war against the British Commonwealth of Nations based on the actual intentions and conduct of Japan:

> "Count 31 charges that a war of aggression was waged against the British Commonwealth of Nations. The Imperial Rescript which was issued about 12 noon on 8 December 1941 (Tokyo time) states: 'We hereby declare war on the United States of America and the British Empire.' There is a great deal of lack of precision in the use of terms throughout the many plans which were formulated for an attack on British possessions. Thus such terms as 'Britain', 'Great Britain' and 'England' are used without discrimination and apparently used as meaning the same thing. In this case there is no doubt as to the entity which is designated by 'the British Empire'. The correct title of that entity is 'the British Commonwealth of

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[398] Ibid., pp. 994-996.

[399] Ibid., pp. 996-998.

> Nations'. That by the use of the term 'the British Empire' they intended the entity which is more correctly called 'the British Commonwealth of Nations' is clear when we consider the terms of the Combined Fleet Operations Order No. 1 already referred to. That order provides that a state of war will exist after 0000 hours X-Day, which was 8 December 1941 (Tokyo time), and that the Japanese forces would then commence operations. It is provided that in the very first phase of the operations the 'South Seas Force' would be ready for the enemy fleet in the Australia area. Later it was provided that 'the following are areas expected to be occupied or destroyed as quickly as operational conditions permit, a), Eastern New Guinea, New Britain'. These were governed by the Commonwealth of Australia under mandate from the League of Nations. The areas to be destroyed or occupied are also stated to include 'strategic points in the Australia area'. Moreover, 'important points in the Australian coast' were to be mined. Now the Commonwealth of Australia is not accurately described as being part of 'Great Britain', which is the term used in the Combined Fleet Secret Operations Order No. 1, nor is it accurately described as being part of 'the British Empire', which is the term used in the Imperial Rescript. It is properly designated as part of 'the British Commonwealth of Nations'. It is plain therefore that the entity against which hostilities were to be directed and against which the declaration of war was directed was 'the British Commonwealth of Nations', and count 31 is well-founded when it charges that a war of aggression was waged against the British Commonwealth of Nations."[400]

(e) The war against the Philippines (United States)

323. The Tokyo Tribunal concluded that Japan undoubtedly waged aggressive war against the people of the Philippines but considered this to be a war against the United States in view of the status of the Philippines at the time. The Tribunal observed:

> "It is charged in count 30 of the Indictment that a war of aggression was waged against the Commonwealth of the Philippines. The Philippines during the period of the war was not a completely sovereign State. So far as international relations were concerned, it was part of the United States of America. It is beyond doubt that a war of aggression was waged against the people of the Philippines. For the sake of technical accuracy we shall consider the aggression against the people of the Philippines as being a part of the war of aggression waged against the United States of America."[401]

7. Individual responsibility of the accused

324. The Tokyo Tribunal considered the individual responsibility of each of the 25 accused in the light of its general findings with respect to the common plan or conspiracy to wage aggressive wars and the waging of aggressive wars against the various countries.

(a) Araki, Sadao

325. The Tokyo Tribunal convicted Araki of counts 1 and 27 after finding that he was one of the leaders of the conspiracy and participated in waging aggressive war, based on the following considerations:

(a) His prominent position in the Army hierarchy as a high-ranking officer (Lieutenant-General and General) and his high-level Cabinet positions in the Government (Minister of War and Minister of Education);

(b) He was a prominent leader of the Army movement and supported its policy of political domination at home and military aggression abroad;

(c) As a Cabinet member, he advanced the Army policy of preparing for wars of aggression by stimulating a warlike spirit, by mobilizing Japan's material resources for war and by giving speeches and controlling the press which was inciting and preparing the Japanese people for war;

(d) He helped to formulate and vigorously advocated the military party's policy of enriching Japan at the expense of its neighbours;

(e) He approved and actively supported the policies of the Japanese Army in Manchuria and Jehol of separating that territory politically from China, creating a Japanese-controlled government and placing its economy under Japanese domination;

(f) As Minister of War, from 1931 to 1934, he played a prominent part in developing and carrying out the military and political policies pursued in Manchuria and Jehol;

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[400] Ibid., pp. 998-1000.

[401] Ibid., p. 1000.

(g) He supported the successive military steps taken for the occupation of that portion of the territories of China;

(h) As Minister of Education in 1938 and 1939, he approved and collaborated in military operations in other parts of China.

326. The Tribunal acquitted Araki of waging aggressive wars under counts 29, 31, 32, 33, 35 and 36 because there was no evidence that he had taken any active part in those wars.[402]

(b) Dohihara, Kenji

327. The Tokyo Tribunal convicted Dohihara of counts 1, 27, 29, 31 32, 35 and 36 after considering his leadership positions in the military, his involvement in the aggressive plans and policies and his participation in waging aggressive war:

(a) He occupied leadership positions in the military (Colonel and General in the Japanese Army);

(b) He was intimately involved in initiating and developing the war of aggression waged against China in Manchuria and in subsequently establishing the Japanese-dominated state of Manchukuo;

(c) He played a prominent part in developing by political intrigue, by the threat and use of force the aggressive policy of the Japanese military party pursued in other areas in China;

(d) He acted in close association with other leaders of the military faction in developing, preparing, and executing their plans to bring East Asia and South-East Asia under Japanese domination;

(e) As a General Officer in the field, he took part in waging aggressive war against the various countries, except France, from 1941 to 1945, including serving as a Lieutenant General on the General Staff, which had overall control of the Lake Khassan fighting, and commanding elements of the Army that fought at Nomohan.[403]

328. The Tribunal acquitted Dohihara of waging aggressive war against France under count 33 because he was not a party to the decision to wage this war made by the Supreme Council for the Direction of War in February 1945 and the evidence did not establish that he had taken part in waging that war.[404]

(c) Hashimoto, Kingoro

329. The Tokyo Tribunal convicted Hashimoto of counts 1 and 27 after finding that he was a principal in forming the conspiracy and contributed largely to its execution, based on the following considerations:

(a) He was in a leadership position as an Army officer;

(b) He joined the conspiracy at an early stage and used all means in his power to achieve its objectives;

(c) He was outspoken in his extreme views, first advocating Japan's expansion through the seizure of Manchuria by force and later advocating the use of force against all Japan's neighbours to accomplish the aims of the conspiracy;

(d) He played a principal role in suppressing the democratic opposition and gaining control of the Government without which the aggressive schemes could not have been accomplished; he was a principal in the March and October 1931 plots to overthrow the existing cabinets and replace them with supporters of the conspiracy and he was also a party to the May 1932 plot resulting in the assassination of Premier Inukai, who had championed democracy and opposed the aggressive policies;

(e) His publications and his societies were devoted to destroying democracy and establishing a form of government more favourable to the use of war to achieve Japan's expansion;

(f) He participated as a propagandist in the execution of the conspiracy;[405]

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[402] Ibid., pp. 1146-1147.

[403] Ibid., pp. 1148-1149.

[404] Ibid.

[405] Ibid., pp. 1151-1152. In this regard, the Tribunal stated: "He was a prolific publicist and contributed to the success of the conspiracy by inciting the appetite of the Japanese people for the possessions of Japan's neighbours, by inflaming Japanese opinion for war to secure these possessions, by his advocacy of an alliance with Germany and Italy which were bent on similar schemes of expansion, by his denunciation of treaties by which Japan had bound herself to refrain from the schemes of aggrandizement which were the aims of the conspiracy, and by his fervent support of the agitation for a great increase in the armaments of Japan so that she might secure these aims by force or the threat of force." Ibid., p. 1152.

(g) After plotting the seizure of Manchuria by force of arms, he played some part in planning the Mukden Incident to serve as a pretext for the Army seizing Manchuria;

(h) He was fully apprised that the war against China was a war of aggression, he conspired to bring about that war and he did everything within his power to secure its success;

(i) He served as a military commander in the field;

(j) He claimed some credit for the seizure of Manchuria and for Japan leaving the League of Nations.[406]

330. The Tribunal acquitted Hashimoto of counts 29, 31 and 32 because there was no evidence directly connecting him with any of the above crimes.[407]

(d) Hata, Shunroko

331. The Tokyo Tribunal convicted Hata of counts 1, 27, 29, 31 and 32 after considering his positions in the Government and the military, his substantial contribution to formulating and executing the aggressive plans and his participation in waging aggressive war:

(a) He occupied leadership positions in the Government (War Minister) and the military (Commander-in-Chief of expeditionary forces in China);

(b) During his brief tenure as War Minister in 1939 and 1940, he contributed substantially to formulating and executing the aggressive plans and exerted considerable influence on government policy;[408]

(c) He favoured Japanese domination of East Asia and the areas to the south and took concrete measures to achieve that objective;[409]

(d) As Commander-in-Chief of the expeditionary forces in China, he continued to wage war in China from 1941 to 1944;

(e) As Inspector General of Military Education, one of the highest active military posts in the Japanese Army, he continued to wage war against China and the Western Powers.

332. The Tribunal acquitted Hata of counts 35 and 36 after finding that he did not participate in waging those aggressive wars because he was in Central China when the Lake Khassan hostilities occurred and he was Aide-de-Camp to the Emperor during the Nomonhan Incident and became War Minister a little more than a week before its conclusion.[410]

(e) Hiranuma, Kiichiro

333. The Tokyo Tribunal convicted Hiranuma of counts 1, 27, 29, 31, 32 and 36 after considering his positions in the Government, his participation in the conspiracy, his support for the aggressive plans and his participation in waging aggressive war:

(a) He occupied leadership positions in the Government (member and President of the Privy Council, Prime Minister, Minister Without Portfolio, Home Minister and Senior Statesmen);

(b) He joined the conspiracy at the beginning or shortly afterwards;

(c) As a member of the Privy Council, he supported the various measures to carry out the aggressive plans of the militarists and, as Prime Minister and as Minister, he continued to support those plans;

(d) As a Senior Statesmen from 1941 to 1945, he attended the meeting on 29 November 1941 to advise the Emperor on the question of peace or war with the Western Powers; he accepted the opinion that war was inevitable and advised strengthening public opinion against the possibility of a long war; and he attended the meeting on 5 April 1945 at which he strongly opposed any overtures for peace and advocated that Japan should fight to the end;

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[406] Ibid., pp. 1152-1153.

[407] Ibid., p. 1153.

[408] In this regard, the Tribunal observed: "The war in China was waged with renewed vigor; the Wang Ching Wei Government was established at Nanking; the plans for control of French Indo-China were developed and the negotiations with the Netherlands in relation to matters concerning the Netherlands East Indies were conducted." Ibid., p. 1154.

[409] In this regard, the Tribunal observed: "To achieve this object he, for example, approved the abolition of political parties to be replaced by the Imperial Rule Assistance Association, and in collaboration with and after consulting other high military authorities he precipitated the fall of the Yonai Cabinet, thereby making way for the full alliance with Germany and the establishment of a virtual totalitarian state in Japan." Ibid., p. 1154.

[410] Ibid., pp. 1154-1155.

(e) He was a supporter of the policy of Japanese domination in East Asia and the South Seas by force when necessary, one of the leaders of the conspiracy and an active participant in furthering its policy;

(f) In carrying out that policy, he waged war against China, the United States, the British Commonwealth, the Netherlands, and in 1939 against the USSR.

334. The Tribunal acquitted Hiranuma of counts 33 and 35 because there was no evidence directly connecting him with those crimes.[411]

(f) Hirota, Koki

335. The Tokyo Tribunal convicted Hirota of counts 1 and 27 after finding that, at least from 1933, he participated in the common plan or conspiracy to wage aggressive wars and, as Foreign Minister, he participated in waging aggressive war against China, based on the following considerations:

(a) He occupied high-level positions (Foreign Minister and Prime Minister) from 1933 to 1938;

(b) During his tenure of office, he was a very able man and a forceful leader, he played a role as originator and supporter of the aggressive plans adopted and executed by the military and the various cabinets and he fully knew of and supported those plans and activities, as follows:

(c) The Japanese gains in Manchuria were consolidated to the advantage of Japan and the political and economic life of North China was "guided" towards separation from China in preparation for Japanese domination of Chinese political and economic life;

(d) In 1936, his Cabinet formulated and adopted the national policy of expansion in East Asia and the Southern Areas, which eventually led to the war between Japan and the Western Powers in 1941;

(e) In 1936, the Japanese aggressive policy regarding the USSR was reiterated and advanced, culminating in the Anti-Comintern Pact;

(f) From 1937, when the war in China was revived, the military operations in China received the full support of the Cabinet;

(g) In 1938, the real policy towards China was clarified and every effort was made to subjugate China, to abolish the Chinese National Government and to replace it with a government dominated by Japan;

(h) In 1938, the plan and legislation for mobilizing manpower, industrial potential and natural resources was adopted which, with little change in essentials, provided the basis for preparing to continue the China War and for waging further aggressive wars.

Defence claim: advocated dispute settlement

336. The Tribunal rejected the defence's final argument that Hirota's consistent advocacy of peace and peaceful or diplomatic negotiation of disputed questions should be an exculpating factor:

> "It is true that Hirota, faithful to his diplomatic training, consistently advocated attempting firstly to settle disputes through diplomatic channels. However, it is abundantly clear that in so doing he was never willing to sacrifice any of the gains or expected gains made or expected to be made at the expense of Japan's neighbours and he consistently agreed to the use of force if diplomatic negotiations failed to obtain fulfilment of the Japanese demands."[412]

337. The Tribunal acquitted Hirota of counts 29, 31 and 32 after finding that the evidence offered did not establish his guilt on those counts. The Tribunal noted that Hirota's attitude and advice as a Senior Statesmen in 1941 was consistent with his opposition to initiating hostilities against the Western Powers; he held no public office after 1938 and played no part in directing the wars addressed in those counts.

338. The Tribunal also acquitted Hirota of counts 33 and 35 after finding no proof of his participation in or support of the military operations at Lake Khassan, or in French Indo-China in 1945.[413]

(g) Hoshino, Naoki

339. The Tokyo Tribunal convicted Hoshino of counts 1, 27, 29, 31 and 32 after finding that, from 1932 to 1941, he was an energetic member of the conspiracy and, in his successive positions, he took a direct part in waging aggressive wars based on the following considerations:

(a) From 1932 to 1940, he occupied positions as Senior Official and later Vice Chief of the Manchukuo Finance Ministry, Senior Official of the Manchukuo

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[411] Ibid., pp. 1156-1157.

[412] Ibid., p. 1159.

[413] Ibid., pp. 1158-1161.

General Affairs Bureau and Chief of the General Affairs Section of the National Affairs Board of Manchukuo;

(b) In those positions, he exerted a profound influence upon the economy of Manchukuo towards Japanese domination of its commercial and industrial development; he cooperated closely with the Commander of the Kwantung Army, the virtual ruler of Manchukuo; he was, in effect, a functionary of that Army whose economic policy was to make the resources of Manchukuo serve the warlike purposes of Japan;

(c) In 1940, he returned to Japan to become a Minister without Portfolio and President of the Planning Board;

(d) In that position he was the leader in the special steps taken to equip Japan for continuing the aggressive war in China and for the contemplated wars of aggression against other countries with possessions in East Asia;

(e) In 1941, he became the Chief Secretary of the Cabinet and later a Councillor of the Planning Board;

(f) In those positions, he was involved in preparing for the aggressive war to be waged against those countries attacked by Japan in December 1941.

340. The Tribunal acquitted Hoshino of counts 33 and 35 after finding insufficient proof of his participation in the relevant wars.[414]

(h) Itagaki, Seishiro

341. The Tokyo Tribunal convicted Itagaki of counts 1, 27, 29, 31, 32, 35 and 36 after finding that he conspired to wage aggressive wars against China, the United States, the British Commonwealth, the Netherlands and the USSR, and he took an active and important part in waging those wars with knowledge of their aggressive character, based on the following considerations:

(a) In 1931, as a colonel in the Kwantung Army, he joined the conspiracy with the immediate object of Japan seizing Manchuria by force; he encouraged agitation supporting this aim; he helped to engineer the Mukden Incident as a pretext for military action; he suppressed attempts to prevent that military action; and he authorized and directed that military action;

(b) He played a principal part in the intrigues which fostered the sham movement for Manchurian independence and resulted in establishing the puppet state of Manchukuo;

(c) In 1934, he became Vice-Chief of Staff of the Kwantung Army and was active in setting up puppet regimes in Inner Mongolia and North China;

(d) He supported extending Japan's military occupation into Outer Mongolia to serve as a threat to the territories of the USSR;

(e) He coined the phrase "Anti-Communism" to serve as a pretext for Japanese aggression in North China;

(f) In 1937, he took part, as a Divisional Commander, in the fighting at Marco Polo Bridge and favoured expanding the area of aggression there;

(g) As Minister of War beginning in 1938, he intensified and extended the attacks on China; he was a party to the ministerial conferences which decided to destroy the National Government of China and to replace it with a puppet regime; he was largely responsible for the preliminary arrangements for setting up the puppet regime of Wang Ching-Wei; he took part in arranging the exploitation of the occupied areas of China for the benefit of Japan; and he was responsible for prosecuting the war against China and for expanding Japan's armaments;

(h) As War Minister, he also tried to trick the Emperor into consenting to the use of force against the USSR at Lake Khassan; he subsequently obtained authority at a Five Ministers Conference to use such force; and he was War Minister during the fighting at Nomonhan;

(i) In the Cabinet, he strongly advocated an unrestricted military alliance among Japan, Germany and Italy;

(j) He strongly supported the Declaration of Japan's so-called "New Order" in East Asia and the South Seas while recognizing that this would lead to war with the USSR, France and the United Kingdom of Great Britain and Northern Ireland, which would defend their possessions in these areas;

(k) From 1939 to 1941, he carried on the war against China as Chief of Staff of the China Expeditionary Army; from 1941 to 1945, he was Commander-in-Chief of the Army in Korea; from 1945 until the surrender, he commanded the 7th Area Army with headquarters in Singapore; and his subordinate armies defended Java, Sumatra, Malaya, the Andaman and Nicobar islands and Borneo.

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[414] Ibid., pp. 1162-1163

342. The Tribunal acquitted Itagaki of count 33 without giving any reason.[415]

(i) Kaya, Okinori

343. The Tokyo Tribunal convicted Kaya of counts 1, 27, 29, 31 and 32 after finding that he was an active member of the conspiracy, he was actively engaged in preparing for and carrying out aggressive wars against China and the Western Powers, and he took a principal part in waging the aggressive wars alleged in those counts, based on the following considerations:

(a) He was a Councillor of the Manchurian Affairs Bureau in 1936, Vice-Minister of Finance in 1937, Finance Minister in 1937 and 1938, Adviser to the Finance Ministry in 1938, a member of the Asia Development Committee in 1939, President of the North China Development Company from 1939 to 1941, Finance Minister from 1941 to 1944 and Adviser to the Finance Ministry in 1944;

(b) In those positions, he took part in formulating the aggressive policies of Japan and in the financial, economic and industrial preparation of Japan to execute those policies;

(c) As Finance Minister and as President of the North China Development Company, he was actively engaged in preparing for and carrying out aggressive wars in China and against the Western Powers;

(d) In his various positions, he took a principal part in waging the aggressive wars.[416]

(j) Kido, Koichi

344. The Tokyo Tribunal convicted Kido of counts 1, 27, 29, 31 and 32 after considering his positions in the Government, his relationship with the Emperor and his support for the aggressive plans and policies:

(a) From 1930 to 1936, although he was a member of the Emperor's household as Chief Secretary to the Lord Keeper of the Privy Seal and was aware of the military and political ventures in Manchuria, he was not associated with the conspiracy;

(b) From 1937 to 1939, he was a member of the Cabinet as Education Minister, Welfare Minister and with the portfolio of Home Affairs;

(c) As a Cabinet member, he adopted the views of the conspirators and devoted himself wholeheartedly to their policy;

(d) He was zealous in pursuing the war in China; he resisted the efforts of the General Staff to shorten the war by making terms with China; and he was intent on the complete military and political domination of China;

(e) As Education Minister, he developed a strong warlike spirit in Japan;

(f) In 1939 and 1940, when he was Lord Keeper of the Privy Seal, he was active in developing a scheme to replace the existing political parties by a single party to give Japan a totalitarian system and remove political resistance to the plans of the conspirators;

(g) As Lord Keeper of the Privy Seal, he was in a specially advantageous position to advance the conspiracy since his principal duty was to advise the Emperor, he was in close touch with political events and he had an intimate political and personal relationship with those most concerned;

(h) He used his position of great influence with the Emperor and political intrigue to further the aims of the conspiracy involving the domination of China, East Asia and the areas to the south;

(i) Although initially hesitant about commencing a war against the Western Powers because of doubts of its successful outcome, he was determined to pursue the aggressive war against China and lent himself to the projected war against the United Kingdom of Great Britain and Northern Ireland, the Netherlands and, if necessary, the United States; as his doubts subsided, he again pursued the full purposes of the conspiracy;

(j) He was instrumental in selecting Tojo as Prime Minister, a determined advocate of immediate war with the Western Powers;

(k) He used his position to support the war with the Western Powers or purposely refrained from taking action to prevent it, such as advising the Emperor to take any stand against war.

345. The Tribunal acquitted Kido of counts 33, 35 and 36 after finding that no evidence had been tendered pointing to his guilt.[417]

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[415] Ibid., pp. 1164-1166.

[416] Ibid., pp. 1169-1170.

[417] Ibid., pp. 1171-1173.

(k) Kimura, Heitaro

346. The Tokyo Tribunal convicted Kimura of counts 1, 27, 29, 31 and 32 after finding that, although he was not a leader, he was a valuable collaborator or accomplice in the conspiracy to wage aggressive wars and played a prominent part in conducting the aggressive wars in China and the Pacific, based on the following considerations:

(a) He was an army officer engaged in administrative work in the War Ministry, Vice-Minister of War in 1941, Councillor of the Planning Board, Councillor of the Total War Research Institute and Commander-in-Chief of the Burma Area Army from 1944 up to the surrender of Japan in 1945;

(b) As Vice-Minister of War, he was in almost daily contact with the War Minister and other ministers, vice-ministers, and bureau chiefs, he was in a position to learn and was kept fully informed of all government decisions and actions during the crucial negotiations with the United States and he had full knowledge of the plans and preparations for the Pacific War and the hostilities in China;

(c) He collaborated and cooperated with the War Minister and the other ministries and gave advice based on his wide experience, wholeheartedly supporting the aggressive plans;

(d) He was not a leader, but he took part in formulating and developing policies which were initiated by him or proposed by the General Staff or other bodies and approved and supported by him;

(e) As commander of a division in 1939 and 1940, then as Chief of Staff of the Kwantung Army and later as Vice-Minister of War, he played a prominent part in conducting the war in China and the Pacific War;

(f) With full knowledge of the illegality of the Pacific War, he commanded the Burma Area Army from 1944 up to the surrender.[418]

(l) Koiso, Kuniaki

347. The Tokyo Tribunal convicted Koiso of counts 1, 27, 29, 31 and 32 after considering his positions in the Government and the military, his participation in the conspiracy, his participation in formulating the aggressive plans and policies, and his participation in waging aggressive war:

(a) He joined the conspiracy in 1931 by participating as a leader of the March Incident to overthrow the Government and replace it with a government favourable to the occupation of Manchuria;

(b) He advocated the plan for Japan to advance "in all directions";

(c) While he was Chief of Staff of the Kwantung Army, from 1932 to 1934, he played a leading role in developing the Japanese plans for expansion; he prepared or concurred in proposals and plans submitted to the Government through the War Ministry for the political and economic organization of Manchukuo, according to the conspirators' policy adopted by the Japanese Government; and the military invasion of Jehol and renewed fighting in Manchuria took place;

(d) As Overseas Minister, he supported and took part in directing the war in China, the beginning of the occupation of French Indo-China and the negotiations intended to obtain concessions from and eventual economic domination of the Netherlands East Indies;

(e) As Prime Minister in 1944 and 1945, he urged and directed the waging of the war against the Western Powers.

348. The Tribunal rejected the defence plea that as Chief of Staff he had merely forwarded proposals and plans to Tokyo which did not import his personal approval. The Tribunal noted his knowledge of the aggressive plans of Japan and his conduct which went beyond the scope of the normal duties of a Chief of Staff in advising on political and economic matters to further those plans.

349. The Tribunal acquitted Koiso of count 36 because there was no evidence that he had played any part in the hostilities at Nomonhan either by organizing or directing them.[419]

(m) Matsui, Iwane

350. The Tokyo Tribunal acquitted Matsui of counts 1, 27, 29, 31, 32, 35 and 36 based on insufficient evidence that he was a conspirator and that he knew of the criminal character of the war.[420] The Tribunal observed:

> "Matsui was a senior officer in the Japanese Army and attained the rank of General in 1933. He had a wide experience in the Army, including service in the Kwantung Army and in the General

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[418] Ibid., pp. 1174-1176.

[419] Ibid., pp. 1177-1179.

[420] Ibid., pp. 1180, 1182.

Staff. Although his close association with those who conceived and carried out the conspiracy suggests that he must have been aware of the purposes and policies of the conspirators, the evidence before the Tribunal does not justify a finding that he was a conspirator.

"His military service in China in 1937 and 1938 cannot be regarded, of itself, as the waging of an aggressive war. To justify a conviction under count 27, it was the duty of the prosecution to tender evidence which would justify an inference that he had knowledge of the criminal character of that war. This has not been done."[421]

(n) Minami, Jiro

351. The Tokyo Tribunal convicted Minami of counts 1 and 27 after considering his positions in the military and the Government, his participation in the conspiracy and his participation in waging aggressive war and carrying out the aggressive plans:

(a) In 1931, he was a General and Minister of War;

(b) Before the Mukden Incident, he joined the conspirators in advocating militarism, the expansion of Japan, and Manchuria as "the lifeline of Japan";[422]

(c) He failed to take adequate steps to prevent the Mukden Incident, which he later described as "righteous self-defence", even though he was forewarned of the likelihood of the incident occurring and was ordered to prevent it;

(d) He agreed to implement the Cabinet decision that the incident must not be expanded, but failed to take adequate steps to restrain the Army as the area of the operations expanded and supported the Army action in the Cabinet;

(e) He early advocated Japan's withdrawal from the League of Nations if it opposed Japan's actions in China;

(f) He knew that the Army was taking steps to occupy Manchuria under a military administration and did nothing to stop it notwithstanding the Cabinet's decision against such measures;

(g) His failure to take steps to control the Army led to the downfall of the Cabinet, after which he advocated that Japan should take over the defence of Manchuria and Mongolia; he had already advocated the founding of a new state in Manchuria;

(h) As Commander-in-Chief of the Kwantung Army from 1934 to 1936, he completed the conquest of Manchuria, he aided in exploiting that part of China for the benefit of Japan, he was responsible for setting up puppet governments in North China and Inner Mongolia under the threat of military action and he was partly responsible for developing Manchuria as a base for attacking the USSR and for planning such an attack;

(i) He became Governor-General of Korea in 1936 and in 1938 supported "the Holy War" against China and the destruction of the National Government of China.

352. The Tribunal acquitted Minami of counts 29, 31 and 32 without giving any reason.[423]

(o) Muto, Akira

353. The Tokyo Tribunal convicted Muto of counts 1, 27, 29, 31 and 32 after considering his position in the Government, his participation in the conspiracy and his principal role in planning, preparing and waging aggressive war:

(a) He joined the conspiracy when he became Chief of the Military Affairs Bureau of the Ministry of War in 1939 and concurrently held a multiplicity of other posts until 1942;[424]

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[421] Ibid., p. 1180. Matsui was convicted on count 55 and sentenced to death by hanging based on his conduct as commander of the Shanghai Expeditionary Force and as Commander-in-Chief of the Central China Area Army which captured the city of Nanking in 1937 and committed a long succession of horrible atrocities. Ibid., pp. 1180, 1182, 1216.

[422] The Tokyo Tribunal concluded that Manchuria was to serve as "a line of advance rather than a line of defence", particularly with respect to the Soviet Union. Ibid., p. 776.

[423] Ibid., pp. 1183-1184.

[424] The Tribunal found that he did not participate in the conspiracy before attaining a high-level policy position, as follows: "He was a soldier and prior to holding the important post of Chief of the Military Affairs Bureau of the Ministry of War he held no appointment which involved the making of high policy. Further, there is no evidence that in this earlier period he, alone or with others, tried to affect the making of high policy." Ibid., p. 1185.

(b) During this period, planning, preparing and waging wars of aggression by the conspirators was at its height and he was a principal in all these activities.

354. The Tribunal acquitted Muto of counts 33 and 36 for the following reasons: he became Chief of the Military Affairs Bureau when the fighting at Nomonhan was over, he was Chief of Staff in the Philippines when Japan attacked French Indo-China in 1945 and he had no part in waging those wars.[425]

(p) Oka, Takasumi

355. The Tokyo Tribunal convicted Oka of counts 1, 27, 29, 31 and 32 after considering his positions in the military, his participation in the conspiracy and his participation in formulating and executing the aggressive policies:

(a) He was an officer in the Japanese Navy, Rear Admiral as of 1940, Chief of the Naval Affairs Bureau of the Navy Ministry from 1940 to 1944 and a member of the Liaison Conference;

(b) As Chief of the Naval Affairs Bureau, he was an active member of the conspiracy from 1940 to 1944;

(c) He was an influential member of the Liaison Conference which largely decided Japanese policy;

(d) He participated in forming and executing the policy to wage aggressive war against China and the Western Powers.[426]

(q) Oshima, Hiroshi

356. The Tokyo Tribunal convicted Oshima of count 1 after finding that he was one of the principal conspirators and consistently supported and promoted the aims of the conspiracy, based on the following considerations:

(a) He was an Army officer engaged in the diplomatic field as first Military Attaché of the Japanese Embassy in Berlin and later as Ambassador from 1939 until the surrender of Japan;

(b) He believed in the success of the Hitler regime, he exerted his full efforts to advance the plans of the Japanese military and he went over the head of the Ambassador and dealt directly with Foreign Minister Ribbentrop in attempting to involve Japan in a full military alliance with Germany;

(c) As Ambassador, he continued his efforts to force Japan to accept a treaty aligning it with Germany and Italy against the Western Powers and opening the way to execute the aggressive policies;

(d) To further the aggressive policy of the Army, he repeatedly pursued a policy in opposition to and in defiance of that of his Foreign Minister;

(e) After returning to Tokyo, he supported the proponents of war by articles in newspapers and magazines and by closely cooperating with the German Ambassador.

Defence claim: diplomatic immunity

357. The Tribunal rejected the defence argument that Oshima was protected by diplomatic immunity and exempt from prosecution with respect to his activities in Germany, for the following reasons:

> "Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence."[427]

358. The Tribunal acquitted Oshima of counts 27, 29, 31 and 32 after finding that he did not take part in directing the wars in China or the Pacific.[428]

(r) Sato, Kenryo

359. The Tokyo Tribunal convicted Sato of counts 1, 27, 29, 31 and 32 after considering his positions in the military and his participation in waging war:

(a) In 1937, he was a member of the Military Affairs Bureau, was promoted to Lieutenant Colonel and appointed an Investigator of the Planning Board and also had other duties with other bodies connected with Japan's war in China and its contemplated wars with other countries;

(b) In 1938, he explained and supported the General Mobilization Law before the Diet;

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[425] Idem.

[426] Tokyo Judgment, p. 1187.

[427] Ibid., p. 1189.

[428] Ibid., pp. 1188-1189.

(c) In 1941, he was appointed Chief of the Military Affairs Section of the Military Affairs Bureau and promoted to Major General;

(d) He was Chief of the Military Affairs Bureau, an important position in the Japanese Army, and concurrently held other appointments mostly concerned with other departments whose activities he linked with the Ministry of War from 1942 to 1944;

(e) As an important government official and an Army Commander, he waged wars of aggression from 1941.[429]

High-level position and knowledge

360. The Tribunal discussed two important criteria in relation to count 1, namely, (a) the necessity of holding a sufficiently high-level position to influence policy decisions, and (b) knowledge of the criminal nature of those policies:

> "It was thus not until 1941 that Sato attained a position which by itself enabled him to influence the making of policy, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the making of policy. The crucial question is whether by that date he had become aware that Japan's designs were criminal, for thereafter he furthered the development and execution of those designs so far as he was able.
>
> "The matter is put beyond reasonable doubt by a speech which Sato delivered in August 1938. He states the Army point of view on the war in China. He shows complete familiarity with the detailed terms, never revealed to China, upon which Japan was prepared to settle the war against China. These on the face of them plainly involved the abolition of the legitimate Government of China, recognition of the puppet state of Manchukuo whose resources had been by this time largely exploited for Japan's benefit, regimentation of the economy of China for Japan's benefit, and the stationing of Japanese troops in China to ensure that these illicit gains would not be lost. He states that North China would be put completely under Japan's control and its resources developed for national defence, i.e., to aid in Japan's military preparations. He predicts that Japan will go to war with the USSR, but says she will select a chance when her armaments and production have been expanded.
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> "This speech shows that Sato did not believe that Japan's actions in China had been dictated by the wish to secure protection for Japan's legitimate interests in China as the defence would have us believe. On the contrary, he knew that the motive of her attacks on China was to seize the wealth of her neighbour. We are of opinion that Sato, having that guilty knowledge, was clearly a member of the conspiracy from 1941 onwards."[430]

(s) Shigemitsu, Mamoru

361. The Tokyo Tribunal convicted Shigemitsu of counts 27, 29, 31, 32 and 33 after considering his positions in the Government, his knowledge of the aggressive war and his participation in waging aggressive war:

(a) He was Foreign Minister from 1943 to 1945, when Japan was engaged in the Pacific War;

(b) He was fully aware that the Pacific War was a war of aggression because he knew of the conspirators' policies which had caused the war;

(c) Although he had often advised against those policies, he played a principal part in waging that war from 1943 to 1945.

362. The Tribunal acquitted Shigemitsu of count 1 after finding that he was not one of the conspirators, based on the following considerations:

(a) He was Minister to China in 1931 and 1932; Councillor of the Board of Manchurian Affairs; Ambassador to the USSR from 1936 to 1938; Ambassador to the United Kingdom from 1938 to 1941; and Ambassador to China in 1942 and 1943;

(b) There was no evidence that he played any part in policy-making as Councillor of the Board of Manchurian Affairs;

(c) As Minister and Ambassador, he never exceeded the functions proper to those offices and he repeatedly advised the Foreign Office in opposition to the policies of the conspirators;

(d) When he became Foreign Minister in 1943, the conspirators' policy to wage certain wars of aggression had been settled and was being executed, and there was no further formulation or development of that policy.

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[429] Ibid., pp. 1190-1191.

[430] Ibid.

363. The Tribunal also acquitted Shigemitsu of count 35 without giving any reason.[431]

(t) Shimada, Shigetaro

364. The Tokyo Tribunal convicted Shimada of counts 1, 27, 29, 31 and 32 after considering his positions in the military and his participation in planning and waging aggressive war:

(a) Until 1941, he was a naval officer carrying out his duties and had no part in the conspiracy;

(b) He was Navy Minister from 1941 to 1944 and Chief of the Navy General Staff in 1944;

(c) As Navy Minister, he took part in all the decisions of the conspirators in planning and launching the attack against the Western Powers on 7 December 1941;

(d) After war was declared, he played a principal part in waging it.

Self-defence claim

365. The Tribunal rejected the claim of self-defence in response to economic measures taken by the Western Powers, which it had previously considered in relation to its general findings and conclusions:

> "He gave as his reason for adopting this course of conduct that the freezing orders were strangling Japan and would gradually reduce her ability to fight; that there was economic and military "encirclement" of Japan; that the United States of America was unsympathetic and unyielding in the negotiations; and that the aid given by the Allies to China had raised bitter feeling in Japan. This defence leaves out of account the fact that the gains to retain which he was determined to fight [for] were, to his knowledge, gains Japan had acquired in years of aggressive war."[432]

(u) Shiratori, Toshio

366. The Tokyo Tribunal convicted Shiratori of count 1 after finding that he supported the aims of the conspiracy for many years and by all the means in his power:

(a) As Chief of the Information Bureau of the Foreign Office from 1930 to 1933, he justified Japan's seizure of Manchuria to the world press;

(b) He early expressed views on policy matters which received consideration in high quarters;

(c) He early advocated that Japan should withdraw from the League of Nations;

(d) He supported the setting-up of a puppet government in Manchuria;

(e) He was Minister to Sweden from 1933 to 1937;

(f) During that period, he was a wholehearted believer in aggressive war and expressed the opinion that Russian influence should be expelled from the Far East by force if necessary, before it became too strong to be attacked, foreign influences harmful to Japanese interests should be excluded from China; and Japanese diplomats should support the policy of the militarists;

(g) When he returned to Japan, he published articles advocating a totalitarian government for Japan and an expansionist policy for Japan, Germany and Italy;

(h) He was appointed Ambassador to Rome when the negotiations for an alliance among Japan, Germany and Italy began in 1938;

(i) In the negotiations, he supported the conspirators, who insisted on a general military alliance among those countries, refused to comply with instructions of the Foreign Minister for a more limited alliance and threatened to resign if the conspirators' wishes were not met;

(j) He returned to Japan after the negotiations broke down and carried on propaganda to prepare the way for the general military alliance with Germany and Italy, which he still thought necessary to support Japan's expansionist aims;

(k) In his propaganda, he advocated all the objects of the conspirators, including, inter alia, that Japan should attack China and Russia, ally itself with Germany and Italy, take determined action against the Western Powers, establish the "New Order", seize the chance offered by the European War to advance to the South and attack Singapore.

367. The Tribunal noted that Shiratori had resigned as adviser to the Foreign Office due to illness in 1941 and thereafter played no important part in events.

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[431] Ibid., pp. 1193-1194.

[432] Ibid., p. 1197.

368. The Tribunal acquitted Shiratori of counts 27, 29, 31 and 32 because he had never occupied a position that would justify a finding that he waged any war of aggression.[433]

(v) Suzuki, Teiichi

369. The Tokyo Tribunal convicted Suzuki of counts 1, 27, 29, 31 and 32 after considering his positions in the Government and the military, his support for the aggressive policies and his participation in preparing for aggressive war and carrying out the aggressive policies:

(a) He was a soldier and an active member of the conspiracy as a Lieutenant Colonel and member of the Military Affairs Bureau in 1932;

(b) He supported the formation of a government which would support the schemes of the conspirators against China;

(c) As a member of the Bureau, he insisted that the USSR was the absolute enemy of Japan and assisted in preparing to wage aggressive war against it;

(d) He actively furthered exploiting the parts of China occupied by Japan as an organizer and head of the political and administrative division of the Asia Development Board;

(e) He became Minister Without Portfolio when a new Cabinet was formed to complete the military domination of Japan and to prosecute the move to the south;

(f) As President of the Planning Board and Minister Without Portfolio, he regularly attended the meetings of the Liaison Conference, the virtual policy-making body for Japan;

(g) He was present at most of the important conferences leading to initiating and waging aggressive wars against the Allied Powers and actively supported the conspiracy at those conferences.

370. The Tribunal acquitted Suzuki of counts 35 and 36 after finding that there was no evidence that he had participated in waging war against the USSR at Lake Khassan or in waging war against the USSR or the Mongolian Peoples' Republic at Nomonhan.[434]

(w) Togo, Shigenori

371. The Tokyo Tribunal convicted Togo of counts 1, 27, 29, 31 and 32 after considering his positions in the Government and his participation in planning and waging aggressive war:

(a) He was Foreign Minister from 1941 to 1942 and again in 1945;

(b) As Foreign Minister, he participated in planning and preparing for the Pacific War;

(c) He attended Cabinet meetings and conferences and concurred in all decisions adopted;

(d) He played a leading role in the duplicitous negotiations with the United States immediately preceding the war and lent himself to the plans of the proponents of war;

(e) After the outbreak of the Pacific War, he collaborated with other members of the Cabinet in its conduct as well as in waging the war in China.[435]

Defence claims

372. The Tribunal rejected the common defence and special defence asserted for Togo:

> "In addition to the defence common to all the accused of encirclement and economic strangulation of Japan, which has been dealt with elsewhere, Togo pleads specially that he joined the Tojo Cabinet on the assurance that every effort would be made to bring the negotiations with the United States to a successful conclusion. He states further that from the date of his taking office he opposed the Army and was successful in obtaining from them concessions which enabled him to keep the negotiations alive. However, when the negotiations failed and war became inevitable, rather than resign in protest he continued in office and supported the war. To do anything else, he said, would have been cowardly. However, his later action completely nullifies this plea. In September 1942, he resigned over a dispute in the Cabinet as to the treatment of occupied countries. We are disposed to judge his action and sincerity in the one case by the same considerations as in the other."[436]

373. The Tribunal acquitted Togo of count 36 after finding no proof of any alleged criminal act. The

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[433] Ibid., pp. 1199-1201.

[434] Ibid., pp. 1202-1203.

[435] Ibid., p. 1204.

[436] Ibid., pp. 1204-1205.

Tribunal noted that "his only part in relation to that count was to sign the post-war agreement between the USSR and Japan settling the boundary between Manchuria and Outer Mongolia".[437]

(x) Tojo, Hideki

374. The Tokyo Tribunal convicted Tojo of counts 1, 27, 29, 31, 32 and 33 after finding that he bore major responsibility for Japan's criminal attacks on its neighbours, based on the following considerations:

(a) In 1937, he became Chief of Staff of the Kwantung Army and was a principal in almost all the activities of the conspirators;

(b) He planned and prepared for an attack on the USSR;

(c) He recommended a further military attack on China to free the Japanese Army from anxiety about its rear in the projected attack on the USSR;

(d) He helped to organize Manchuria as a base for the attack on the USSR and never abandoned the intention to launch such an attack if a favourable chance should occur;

(e) In 1938, he became Vice-Minister of War and held many other appointments; he played an important part in almost all aspects of mobilizing the Japanese people and economy for war; and he opposed suggestions for a peaceful compromise with China;

(f) In 1940, he became Minister of War; he advocated and furthered the aims of the conspiracy with ability, resolution and persistence; and he participated as a principal in the successive steps of the conspirators in planning and waging wars of aggression against Japan's neighbours;

(g) From 1941 to 1944, he was Prime Minister;

(h) As War Minister and Premier, he consistently supported the policy of conquering the National Government of China, developing the resources of China in Japan's behalf and retaining Japanese troops in China to safeguard for Japan the results of the war against China;

(i) In the negotiations preceding the attacks of 7 December 1941, his resolute attitude was that Japan must secure terms which would preserve the fruits of its aggression against China and establish Japan's domination of East Asia and the Southern Areas;

(j) He used his great influence to support that policy and played a leading part in deciding to go to war to support it.

Self-defence claim

375. The Tribunal rejected as wholly unfounded the plea that all of the attacks were legitimate measures of self-defence.

376. The Tribunal acquitted Tojo of count 36 after finding no evidence that he had occupied any official position which would render him responsible for the war in 1939 as charged.[438]

(y) Umezu, Yoshijiro

377. The Tokyo Tribunal convicted Umezu of counts 1, 27, 29, 31 and 32 after finding overwhelming evidence that he was a member of the conspiracy. The Tribunal considered his positions in the military and his participation in planning and waging aggressive war:

(a) He was an Army officer;

(b) As commander of Japanese troops in North China from 1934 to 1936, he continued the Japanese aggression against the northern provinces, he set up a pro-Japanese local government, and under threat of force compelled the Chinese to enter into the 1935 Ho-Umezu Agreement limiting the power of the legitimate Government of China;

(c) From 1936 to 1938, he was Vice-Minister of War while the Army's National Policy Plans and the Plan for Important Industries, which were a prime cause of the Pacific War, were decided upon;

(d) When renewed fighting broke out in China in 1937 at Marco Polo Bridge, he knew about and approved of the plans of the conspirators to carry on the war;

(e) He was a member of the Cabinet Planning Board and many other boards and commissions which contributed to formulating the aggressive plans of the conspirators and preparing to execute those plans;

(f) In 1937, the Chief of Staff of the Kwantung Army sent him plans for preparing the attack on the USSR, strengthening the Kwantung Army and installations in Inner Mongolia which were of vital importance to the wars with the USSR and China;

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[437] Ibid., p. 1205.

[438] Ibid., pp. 1206-1207.

(g) From 1939 to 1944, while he was Commander of the Kwantung Army, he directed the economy of Manchukuo to serve the purposes of Japan and plans were made for occupying Soviet territories and the military administration of Soviet areas;

(h) As Chief of the Army General Staff from 1944 up to the surrender, he played a principal part in waging war against China and the Western Powers.

378. The Tribunal acquitted Umezu of count 36 after finding that the fighting at Nomonhan had begun before he took command of the Kwantung Army and he was in command for only a few days before it ceased.[439]

IV. The United Nations

379. In 1945, the Charter of the United Nations was adopted in the aftermath of the Second World War. It rejected the notion of the use of force as a means for settling disputes. Article 2, paragraph 4, of the Charter expressly recognizes the obligation to refrain in international relations "from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

380. Since 1945, the Security Council, the General Assembly and the International Court of Justice have considered acts of aggression contrary to Article 2, paragraph 4, of the Charter in accordance with the responsibilities entrusted to these principal organs of the United Nations.

A. The Security Council

381. The Security Council has primary responsibility for the maintenance of international peace and security under Article 24 of the Charter of the United Nations. It is authorized to determine the existence of any threat to the peace, breach of the peace or act of aggression according to Article 39 of the Charter. It is further authorized to make recommendations or decide what measures shall be taken to maintain or restore international peace and security in accordance with Articles 41 and 42.

382. The Security Council has addressed acts of aggression in a number of situations.

1. Southern Rhodesia

383. The Security Council adopted a number of resolutions over a period of years condemning various acts of aggression committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique and Zambia.

384. In its resolution 326 (1973) of 2 February 1973, the Security Council considered aggressive acts committed by Southern Rhodesia against Zambia and, inter alia:

(a) Expressed its grave concern regarding "the situation created by the provocative and aggressive acts committed by the illegal regime in Southern Rhodesia against the security and economy of Zambia";

(b) Recalled its resolution 232 (1966) determining that the situation in Southern Rhodesia constituted a threat to international peace and security;

(c) Was convinced that "the recent provocative and aggressive acts perpetrated by the illegal regime against Zambia" aggravated the situation;

(d) Expressed deep shock and grief at "the loss of human life and damage to property caused by the aggressive acts of the illegal regime in Southern Rhodesia and its collaborators against Zambia".[440]

385. In its resolutions 386 (1976) of 17 March 1976 and 411 (1977) of 30 June 1977, the Security Council considered acts of aggression committed by Southern Rhodesia against Mozambique. In resolution 386 (1976), the Council condemned "all provocative and aggressive acts, including military incursions, against the People's Republic of Mozambique by the illegal minority regime of Southern Rhodesia".[441] In resolution 411 (1977) the Council, inter alia:

(a) Expressed its indignation at "the systematic acts of aggression committed by the illegal regime in Southern Rhodesia against the People's Republic of Mozambique and the resulting loss of life and destruction of property";

(b) Was cognizant of the fact that the recent acts of aggression against Mozambique, together with Southern Rhodesia's "constant acts of aggression and threats against the sovereignty and territorial integrity" of Botswana and Zambia, aggravated the existing serious threat to the security and stability of the region;

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[439] Ibid., pp. 1210-1211.

[440] Security Council resolution 326 (1973) was adopted by 13 votes to none, with 2 abstentions (United Kingdom of Great Britain and Northern Ireland and United States of America).

[441] Security Council resolution 386 (1976), para. 2. The resolution was adopted unanimously.

(c) Strongly condemned "the illegal racist minority regime in Southern Rhodesia for its recent acts of aggression" against Mozambique;

(d) Solemnly declared that "these acts of aggression as well as the repeated attacks and threats" against Zambia and Botswana by Southern Rhodesia seriously aggravated the situation in the region.[442]

386. In its resolution 424 (1978) of 17 March 1978, the Security Council considered new acts of aggression committed by Southern Rhodesia against Zambia, including armed invasion, and inter alia:

(a) Expressed its grave concern at "the numerous hostile and unprovoked acts of aggression by the illegal minority regime in Southern Rhodesia violating the sovereignty, airspace and territorial integrity of the Republic of Zambia, resulting in the death and injury of innocent people, as well as the destruction of property, and culminating on 6 March 1978 in the armed invasion of Zambia";

(b) Reaffirmed that "the existence of the minority racist regime in Southern Rhodesia and the continuance of its acts of aggression against Zambia and other neighbouring States" constituted a threat to international peace and security;

(c) Strongly condemned "the recent armed invasion perpetrated by the illegal racist minority regime in the British colony of Southern Rhodesia against the Republic of Zambia", in flagrant violation of its sovereignty and territorial integrity.[443]

387. In its resolution 445 (1979) of 8 March 1979, the Security Council considered the armed invasion of Angola, Mozambique and Zambia perpetrated by Southern Rhodesia and, inter alia:

(a) Expressed its grave concern at "the indiscriminate military operations undertaken by the illegal regime and the extension of its premeditated and provocative acts of aggression not only against neighbouring independent countries but also against non-contiguous States, resulting in wanton killings of refugees and civilian populations";

(b) Reaffirmed that "the existence of the illegal racist minority regime in Southern Rhodesia and the continuance of its acts of aggression against neighbouring independent States" constituted a threat to international peace and security;

(c) Strongly condemned the recent armed invasions perpetrated by Southern Rhodesia against Angola, Mozambique and Zambia in flagrant violation of their sovereignty and territorial integrity.[444]

388. In its resolution 455 (1979) of 23 November 1979, the Security Council considered further acts of aggression committed by Southern Rhodesia against Zambia, with the collusion of South Africa, and, inter alia:

(a) Expressed its grave concern at "the numerous hostile and unprovoked acts of aggression committed by the illegal minority regime in Southern Rhodesia violating the sovereignty, airspace and territorial integrity of the Republic of Zambia";

(b) Also expressed its grave concern at "the continuing collusion by South Africa in the repeated acts of aggression launched against the Republic of Zambia by the rebel forces of the illegal minority regime in Southern Rhodesia";

(c) Expressed its grief at the tragic loss of human life and concern about the damage and destruction of property resulting from the repeated acts of aggression committed by Southern Rhodesia against Zambia;

(d) Was convinced that "these wanton acts of aggression" by Southern Rhodesia formed "a consistent and sustained pattern of violations" aimed at destroying Zambia's economic infrastructure and weakening its support for Zimbabwe's struggle for freedom and national liberation;

(e) Reaffirmed that "the existence of the minority racist regime in Southern Rhodesia and the continuance of its acts of aggression against Zambia and other neighbouring States" constituted a threat to international peace and security;

(f) Strongly condemned Southern Rhodesia for the "continued, intensified and unprovoked acts of aggression" against Zambia in flagrant violation of its sovereignty and territorial integrity;

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[442] Security Council resolution 411 (1977) was adopted unanimously.

[443] Security Council resolution 424 (1978) was adopted unanimously.

[444] Security Council resolution 445 (1979) was adopted by 12 votes to none, with 3 abstentions (France, United Kingdom and United States).

(g) Strongly condemned the continued collusion by South Africa in repeated acts of aggression launched against Zambia.[445]

2. South Africa

389. The Security Council adopted a number of resolutions condemning acts of aggression committed by South Africa against Angola, Botswana, Lesotho, Seychelles and other States in southern Africa.[446]

390. From 1976 to 1987, the Security Council adopted several resolutions condemning acts of aggression committed by South Africa against Angola and the use by South Africa of the international Territory of Namibia to mount these aggressive acts. In its resolution 387 (1976) of 31 March 1976, the Council considered the armed invasion of Angola by South Africa and, inter alia:

(a) Expressed its grave concern at the acts of aggression committed by South Africa against Angola in violation of its sovereignty and territorial integrity;

(b) Condemned South Africa's use of the international Territory of Namibia to mount that aggression;

(c) Expressed its grave concern at the damage and destruction caused by the South African invading forces in Angola and by their seizure of Angolan equipment and material;

(d) Condemned South Africa's aggression against Angola.[447]

391. In its resolution 546 (1984) of 6 January 1984, the Security Council considered the bombing and partial occupation of Angola by South Africa and, inter alia:

(a) Expressed its grave concern at "the renewed escalation of unprovoked bombing and persistent acts of aggression, including the military occupation, committed by the racist regime of South Africa in violation of the sovereignty, airspace and territorial integrity of Angola";

(b) Expressed its grief at "the tragic and mounting loss of human life" and its concern about "the damage and destruction of property resulting from those escalated bombing and other military attacks against and occupation of the territory of Angola by South Africa";

(c) Strongly condemned South Africa "for its renewed, intensified, premeditated and unprovoked bombing, as well as the continuing occupation of parts of the territory of Angola, which constitute a flagrant violation of the sovereignty and territorial integrity of that country and endanger seriously international peace and security";

(d) Reaffirmed the "right of Angola, in accordance with the relevant provisions of the Charter of the United Nations and, in particular, Article 51, to take all the measures necessary to defend and safeguard its sovereignty, territorial integrity and independence";

(e) Reaffirmed that "Angola is entitled to prompt and adequate compensation for the damage to life and property consequent upon these acts of aggression and the continuing occupation of parts of its territory by the South African military forces".[448]

392. In its resolution 571 (1985) of 20 September 1985, the Security Council considered the renewed escalation of acts of aggression by South Africa against Angola, which formed a consistent and sustained pattern of violations, and, inter alia:

(a) Expressed its grave concern at "the further renewed escalation of hostile, unprovoked and persistent acts of aggression and sustained armed invasions" committed by South Africa in violation of the sovereignty, airspace and territorial integrity of Angola;

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[445] Security Council resolution 455 (1979) was adopted by consensus. On 11 April 1980, the Council adopted resolution 466 (1980) unanimously, in which it did not refer to "acts of aggression", but in paragraph 1 strongly condemned the racist regime of South Africa for "its continued, intensified and unprovoked acts against the Republic of Zambia, which constitute a flagrant violation of the sovereignty and territorial integrity of Zambia".

[446] See Security Council resolution 418 (1977) adopted unanimously on 4 November 1977 (recognizing that South Africa's military build-up and persistent acts of aggression against neighbouring States seriously disturbed their security; and strongly condemning South Africa for its attacks against neighbouring independent States); and resolution 581 (1986) adopted by 13 votes to none, with 2 abstentions (United Kingdom and United States) on 13 February 1986 (strongly condemning South Africa for its threats to perpetrate acts of aggression against the front-line States and other States in southern Africa).

[447] Security Council resolution 387 (1976) was adopted by 9 votes to none, with 5 abstentions (France, Italy, Japan, United Kingdom and United States), with 1 member not participating in the vote (China).

[448] Security Council resolution 546 (1984) was adopted by 13 votes to none, with 2 abstentions (United Kingdom and United States).

(b) Was convinced that "the intensity and timing of these acts of armed invasions are intended to frustrate efforts at negotiated settlements in southern Africa";

(c) Expressed its grief at the tragic loss of human life, mainly that of civilians, and its concern about the damage and destruction of property resulting from the escalated acts of aggression;

(d) Expressed its grave concern that "these wanton acts of aggression by South Africa form a consistent and sustained pattern of violations" and were aimed at weakening the support of front-line States for the freedom and national liberation movements for Namibia and South Africa;

(e) Strongly condemned "the racist regime of South Africa for its premeditated, persistent and sustained armed invasions" of Angola, which constituted a flagrant violation of its sovereignty and territorial integrity and a serious threat to international peace and security;

(f) Strongly condemned South Africa for using the international Territory of Namibia as a springboard for perpetrating armed invasions and destabilizing Angola.[449]

393. In paragraph 6 of the same resolution, the Security Council also called for payment of "full and adequate compensation" to Angola for the "damage resulting from the invasion by South African forces".

394. In its resolution 568 (1985) of 21 June 1985, the Security Council considered the premeditated acts of aggression committed by South Africa against Botswana, including the military attack on its capital, and, inter alia:

(a) Expressed its shock and indignation at the resulting loss of human life, the injuries inflicted and the extensive damage;

(b) Expressed "its profound concern that the racist regime resorted to the use of military force against the defenceless and peace-loving nation of Botswana";

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[449] Security Council resolution 571 (1985) was adopted unanimously. See also Council resolution 428 (1978) adopted unanimously on 6 May 1978 (expressing grave concern at the armed invasions committed by South Africa in violation of the sovereignty, airspace and territorial integrity of Angola, particularly the armed invasion of 4 May 1978; and strongly condemning the latest armed invasion by South Africa against Angola in flagrant violation of its sovereignty and territorial integrity); resolution 447 (1979) adopted by 12 votes to none, with 3 abstentions (France, United Kingdom and United States) on 28 March 1979 (expressing grave concern at "the premeditated, persistent and sustained armed invasions committed by South Africa in violation of the sovereignty, airspace and territorial integrity" of Angola; and condemning strongly these armed invasions in flagrant violation of Angola's sovereignty and territorial integrity); resolution 454 (1979) adopted by 12 votes to none, with 3 abstentions (France, United Kingdom and United States) on 2 November 1979 (expressing grave concern at "the premeditated, persistent and sustained armed invasions committed by South Africa in violation of the sovereignty, airspace and territorial integrity" of Angola; and strongly condemning South Africa's aggression against Angola); resolution 475 (1980) adopted by 12 votes to none, with 3 abstentions (France, United Kingdom and United States) on 27 June 1980 (expressing grave concern at the escalation of hostile, unprovoked and persistent acts of aggression and sustained armed invasions committed by South Africa in violation of the sovereignty, airspace and territorial integrity of Angola; and strongly condemning South Africa for the premeditated, persistent and sustained armed invasions of Angola in flagrant violation of its sovereignty and territorial integrity); resolution 567 (1985) adopted unanimously on 20 June 1985 (strongly condemning "South Africa for its recent act of aggression against the territory of Angola in the province of Cabinda as well as for its renewed intensified, premeditated and unprovoked acts of aggression" in flagrant violation of Angola's sovereignty and territorial integrity); resolution 574 (1985) adopted unanimously on 7 October 1985 (strongly condemning South Africa for the premeditated and unprovoked armed aggression against Angola by armed invasion on 28 September 1985 and the continuing occupation of parts of Angola's territory in flagrant violation of its sovereignty and territorial integrity); resolution 577 (1985) adopted unanimously on 6 December 1985 (strongly condemning South Africa for the continued, intensified and unprovoked acts of aggression against Angola in flagrant violation of its sovereignty and territorial integrity); and resolution 602 (1987) adopted unanimously on 25 November 1987 (strongly condemning South Africa for the continued and intensified acts of aggression against Angola as well as the continuing occupation of parts of Angola in flagrant violation of its sovereignty and territorial integrity).

(c) Expressed its grave concern that such acts of aggression could only aggravate the already volatile and dangerous situation in southern Africa;

(d) Noted that the latest incident was one in a series of provocative acts carried out by South Africa against Botswana as well as its declared intention to continue and escalate such attacks;

(e) Strongly condemned "South Africa's recent unprovoked and unwarranted military attack on the capital of Botswana as an act of aggression against that country and a gross violation of its territorial integrity and national sovereignty";

(f) Further condemned "all acts of aggression, provocation and harassment, including murder, blackmail, kidnapping and destruction of property committed by the racist regime of South Africa against Botswana".[450]

395. In its resolution 572 (1985) of 30 September 1985, the Security Council, in paragraph 4, demanded that "South Africa pay full and adequate compensation to Botswana for the loss of life and damage to property resulting from its act of aggression".[451]

396. In its resolution 527 (1982) of 15 December 1982, the Security Council, after condemning South Africa "for its premeditated aggressive act against the Kingdom of Lesotho which constitut[ed] a flagrant violation of the sovereignty and territorial integrity of that country", demanded "the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage to life and property resulting from this aggressive act". It also called upon South Africa to declare publicly that "it will, in the future, comply with provisions of the Charter and that it will not commit aggressive acts against Lesotho either directly or through its proxies".[452]

397. In its resolution 580 (1985) of 30 December 1985, the Security Council considered South Africa's responsibility for the fatal attack on South African refugees and nationals of Lesotho and, inter alia:

(a) Expressed its grave concern "at the recent unprovoked and premeditated killings for which South Africa is responsible, in violation of the sovereignty and territorial integrity of the Kingdom of Lesotho, and their consequences for peace and security in southern Africa";

(b) Expressed its grave concern that this act of aggression was aimed at weakening the humanitarian support given by Lesotho to South African refugees;

(c) Was grieved at "the tragic loss of life of six South African refugees and three nationals of Lesotho resulting from this act of aggression committed against Lesotho";

(d) Strongly condemned "these killings and recent acts of unprovoked and premeditated violence, for which South Africa is responsible", against Lesotho in flagrant violation of its sovereignty and territorial integrity;

(e) Demanded "the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage and loss of life resulting from this act of aggression".[453]

398. By its resolution 496 (1981) of 15 December 1981, the Security Council condemned the "mercenary aggression [of 25 November 1981] against the Republic of Seychelles and the subsequent hijacking" and decided to send a commission of inquiry in order to investigate the origin, background and financing of the mercenary aggression and assess and eval[illegible]e economic damages and report to the Council.[454] On the basis of that report, the Council adopted resolution 507 (1982) of 28 May 1982, in which it strongly condemned the mercenary aggression against Seychelles and commended Seychelles for successfully repulsing the mercenary aggression and defending its territorial integrity and independence. In the same resolution, the Council called upon all States to provide it with any information they might have in connection with the mercenary aggression likely to throw further light on the aggression, in particular transcripts of court proceedings and testimony in any trial of any member of the invading mercenary force.[455]

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[450] Security Council resolution 568 (1985) was adopted unanimously.

[451] Security Council resolution 572 (1985) was adopted unanimously.

[452] Security Council resolution 527 (1982) was adopted unanimously.

[453] Security Council resolution 580 (1985) was adopted unanimously.

[454] Security Council resolution 496 (1981) was adopted unanimously.

[455] Security Council resolution 507 (1982) was adopted unanimously.

3. Benin

399. In 1977, Benin was attacked by an invading force of mercenaries. In its resolution 405 (1977) adopted on 14 April 1977, the Security Council condemned the attack as an act of aggression. After considering the report[456] of the Security Council Special Mission on the attack, the Security Council, inter alia:

(a) Expressed its deep grief "at the loss of life and substantial damage to property caused by the invading force during its attack on Cotonou on 16 January 1977";

(b) Strongly condemned "the act of armed aggression perpetrated against the People's Republic of Benin on 16 January 1977";

(c) Reaffirmed its resolution 239 (1967) condemning "any State which persists in permitting or tolerating the recruitment of mercenaries and the provision of facilities to them, with the objective of overthrowing the Governments of Member States".[457]

4. Tunisia

400. The Security Council has on two separate occasions condemned attacks committed by Israel against Tunisia and characterized these attacks as unlawful acts of aggression.

401. In its resolution 573 (1985) of 4 October 1985, the Security Council considered the air raid perpetrated by Israel against Tunisia and, inter alia:

(a) Noted with concern "that the Israeli attack has caused heavy loss of human life and extensive material damage";

(b) Considered the obligation referred to in Article 2, paragraph 4, of the Charter;

(c) Expressed grave concern regarding "the threat to peace and security in the Mediterranean region posed by the air raid perpetrated on 1 October by Israel in the area of Hammam Plage, situated in the southern suburb of Tunis";

(d) Drew attention to the serious effect which "the aggression carried out by Israel" could not but have on any Middle East peace initiative;

(e) Considered that the Israeli Government had claimed responsibility for the attack;

(f) Condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct";

(g) Demanded "that Israel refrain from perpetrating such acts of aggression or threatening to do so".[458]

402. In its resolution 611 (1988) of 25 April 1988, the Security Council considered the "new act of aggression" committed by Israel against Tunisia and, inter alia:

(a) Noted with concern that "the aggression perpetrated on 16 April 1988 in the locality of Sidi Bou Said has caused loss of human life, particularly the assassination of Mr. Khalil al-Wazir";

(b) Recalled the obligation set forth in Article 2, paragraph 4, of the Charter;

(c) Expressed grave concern regarding "the act of aggression which constitutes a serious and renewed threat to peace, security and stability in the Mediterranean region";

(d) Condemned "vigorously the aggression perpetrated on 16 April 1988 against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations, international law and norms of conduct".[459]

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[456] S/12294/Rev.1. The Special Mission reached the following conclusions concerning the attack:

> "Inasmuch as the territorial integrity, independence and sovereignty of the State of Benin was violated by this invading force which came from outside the territory of that country, there can be no doubt that the State of Benin was subjected to aggression.
>
> "It is also clear that a majority of the attacking force, not nationals of Benin, were participating in this action for pecuniary motives and were, therefore, mercenaries." Ibid., paras. 142-143.

[457] Security Council resolution 405 (1977) was adopted by consensus. In its subsequent resolution 419 (1977) adopted without a vote on 24 November 1977, the Council considered further "threats of aggression by mercenaries" against Benin. It took note of Benin's desire to have the mercenaries who had participated in the attack subjected to due process of law.

[458] Security Council resolution 573 (1985) was adopted by 14 votes to none, with 1 abstention (the United States).

5. Iraq

403. Following the invasion of Kuwait on 2 August 1990 by the military forces of Iraq, the Security Council, acting under Articles 39 and 40 of the Charter, adopted resolution 660 (1990), in which it condemned "the Iraq invasion of Kuwait".[460] In a number of subsequent resolutions, the Council, while condemning the "invasion" and illegal "occupation" of Kuwait by Iraq,[461] did not use the term "aggression" or "act of aggression".[462]

404. In its resolution 667 (1990) of 16 September 1990, following the invasion of Kuwait by Iraq and the decision of Iraq to order the closure of diplomatic and consular missions in Kuwait and to withdraw the privileges and immunities of those missions and their personnel, the Security Council strongly condemned "aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises".[463]

B. The General Assembly

405. The General Assembly, in accordance with Article 11 of the Charter, may discuss any questions relating to the maintenance of international peace and security brought before it by a Member State, the Security Council or a non-member State.[464] The General Assembly may also make recommendations regarding such questions to the State or States concerned, the Security Council or both, except as provided in Article 12. The Assembly must refer any such question requiring action to the Security Council either before or after discussion. The Assembly may further recommend measures for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among States in accordance with Article 14, except as provided in Article 12. The Assembly is precluded from making any recommendation regarding a dispute or situation in respect of which the Security Council is exercising its functions assigned by the Charter unless so requested by the Council under Article 12. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

406. On 3 November 1950, the General Assembly adopted resolution 377 (V) on "Uniting for peace", in which it reaffirmed that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belonged to the Security Council, and expressed the desire that, pending the conclusion of such agreements, the United Nations had at its disposal means for maintaining international peace and security. The Assembly further indicated that if the Council, because of lack of unanimity of the permanent members, failed to exercise its primary responsibility for the maintenance of international peace and security in any case where there appeared to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[465]

407. In 1965, the General Assembly adopted a Declaration on the Inadmissibility of Intervention in the

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[459] Security Council resolution 611 (1988) was adopted by 14 votes to none, with 1 abstention (the United States).

[460] Security Council resolution 660 (1990) was adopted by 14 to none. One member (Yemen) did not participate in the vote.

[461] See for example, resolution 661 (1990) adopted on 6 August 1990 (by a vote of 13 to none with 2 abstentions) and resolution 662 (1990) adopted unanimously on 9 August 1990.

[462] See General Assembly resolution 2131 (XX) adopted on 27 December 1965 in which "armed intervention" is considered synonymous with "aggression".

[463] Security Council resolution 667 (1990) was adopted unanimously.

[464] The General Assembly, under Article 13, paragraph 1 (a), of the Charter of the United Nations, is also authorized to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. In this regard, the General Assembly requested the International Law Commission to prepare the draft Code of Crimes against the Peace and Security of Mankind. The draft article containing the definition of the crime of aggression and the commentary thereto adopted by the International Law Commission in 1996 is reproduced in document PCNICC/2000/WGCA/INF/1, which was distributed to the Working Group on the Crime of Aggression at the fifth session of the Preparatory Commission, held from 12 to 30 June 2000.

[465] General Assembly resolution 377 (V) adopted by 52 votes to 5, with 2 abstentions.

Domestic Affairs of States and the Protection of Their Independence and Sovereignty (resolution 2131 (XX)).[466] The seventh preamble paragraph of the resolution provides that "armed intervention is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international cooperation between States should be built".

408. In 1974, the General Assembly adopted a definition of aggression to provide guidance to the Security Council in determining acts of aggression under Article 39 of the Charter. In addition, the Assembly has adopted a number of resolutions concerning acts of aggression in situations involving Korea, Namibia, South Africa, the Middle East, and Bosnia and Herzegovina. In some instances, the General Assembly declared that particular conduct of a State constituted an act of aggression in terms of the Definition of Aggression.

1. The Definition of Aggression

409. In 1974, the General Assembly adopted a definition of aggression to provide guidance to the Security Council in determining, in accordance with the Charter, the existence of an act of aggression.[467] The Assembly considered that aggression was the most serious and dangerous form of the illegal use of force.[468] It also recognized that a war of aggression was a crime against international peace.[469]

410. Article 1 defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter ..."[470]

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[466] General Assembly resolution 2131 (XX) was adopted on 21 December 1965 by 109 in favour and 1 abstention.

[467] General Assembly resolution 3314 (XXIX), adopted without a vote on 14 December 1974. Similarly, the Special Committee of the Temporary Mixed Commission for the Reduction of Armaments established by the League of Nations had previously considered it desirable to define exactly what constituted an act of aggression in order to provide the basis for the Council to decide in a given case whether an act of aggression had been committed. The Commission concluded that "no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised". The Commission also concluded that it was therefore "necessary to leave the Council complete discretion in the matter" and to merely indicate the factors that may provide the elements of a just decision. These factors were summarized as follows:

> "(a) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory;
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> (b) Secret military mobilization by the formation and employment of irregular troops or by a declaration of a state of danger of war which would serve as a pretext for commencing hostilities;
>
> (c) Air, chemical or naval attack carried out by one party against another;
>
> (d) The presence of the armed forces of one party in the territory of another;
>
> (e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council;
>
> (f) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal of that party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given."

The Commission further concluded that "in the case of a surprise attack it would be relatively easy to decide on the aggressor, but that in the general case, where aggression is preceded by a period of political tension and general mobilization, the determination of the aggressor and the moment at which aggression occurred would prove very difficult". However, the Commission also noted that in such a case the Council would have been engaged in efforts to avoid war and therefore would probably be in a position to form an opinion as to which party was "really actuated by aggressive intentions". Commentary on the Definition of a Case of Aggression by a Special Committee of the Temporary Mixed Commission, Records of the Fourth Assembly, Minutes of the Third Committee, League of Nations O.J. Spec. Supp. 26, pp. 183-185.

[468] Resolution 3314 (XXIX), preamble, para. 5.

[469] Ibid., article 5, para. 2. The Assembly had previously recognized that a war of aggression constituted a crime against peace in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, resolution 2625 (XXV) adopted without a vote on 24 October 1970, annex.

[470] The General Assembly had previously considered "that armed intervention is synonymous with aggression" in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. General Assembly resolution 2131 (XX), adopted by a vote of 109 to none, with 1 abstention, on 21 December 1965.

411. Article 2 provides that the first use of armed force by a State in contravention of the Charter constitutes prima facie evidence of an act of aggression. However, the Security Council may conclude that the act does not constitute aggression based on other relevant circumstances, including the insufficient gravity of the act or its consequences.

412. Article 3 sets forth a list of acts which, regardless of a declaration of war, qualify as an act of aggression subject to article 2:

> "(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;[471]
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;[472]
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;[473]
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

413. Article 4 explicitly recognizes the non-exhaustive nature of this list as well as the possibility of the Security Council determining that other acts constitute aggression under the Charter.

414. Article 5, paragraph 1, provides that no consideration of whatever nature, whether political, economic, military or otherwise, may justify aggression.[474]

2. Resolutions concerning situations involving aggression

(a) Korea

415. In its resolution 498 (V), adopted on 1 February 1951, the General Assembly considered the intervention of China in Korea and concluded that China had

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[471] The Report of the Special Committee on the Question of Defining Aggression contained the following note: "With reference to article 3, subparagraph (b), the Special Committee agreed that the expression 'any weapons' is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon." *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19* (A/9619), para. 20.

[472] The Report of the Sixth Committee contained the following statement on the Definition of Aggression: "The Sixth Committee agreed that nothing in the Definition of Aggression, and in particular article 3 (c), shall be construed as a justification for a State to block, contrary to international law, the routes of free access of a land-locked country to and from the sea." *Official Records of the General Assembly, Twenty-ninth Session, Annexes, agenda item 86*, document A/9890, para. 9.

[473] The Report of the Sixth Committee contained the following statement on the Definition of Aggression: "The Sixth Committee agreed that nothing in the Definition of Aggression, and in particular article 3 (d), shall be construed as in any way prejudicing the authority of a State to exercise its rights within its national jurisdiction, provided such exercise is not inconsistent with the Charter of the United Nations." Ibid., para. 10.

[474] The Report of the Special Committee on the Question of Defining Aggression contained the following note:

> "With reference to the first paragraph of article 5, the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, according to which 'no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'." *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19* (A/9619), para. 20.

engaged in aggression. The General Assembly, inter alia:

(a) Noted that "the Security Council, because of lack of unanimity of the permanent members, has failed to exercise its primary responsibility for the maintenance of international peace and security in regard to Chinese Communist intervention in Korea";

(b) Noted that China had not accepted United Nations proposals to bring about a cessation of hostilities in Korea with a view to peaceful settlement and that its armed forces continued their invasion of Korea and their large-scale attacks upon United Nations forces there;

(c) Found that China, "by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea".[475]

(b) Namibia

416. From the 1960s through the 1980s, the General Assembly adopted a series of resolutions condemning South Africa for its occupation of Namibia as an act of aggression and its use of the international Territory of Namibia to commit aggression against independent African States. In 1963, the Assembly adopted resolution 1899 (XVIII) on South West Africa, by which it considered that "any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression". In 1978, the General Assembly convened its ninth special session to consider the deteriorating situation in Namibia resulting from South Africa's attempts to perpetuate its illegal occupation of the Territory and its increased acts of aggression against the Namibian people. In resolution S-9/2, adopted on 3 May 1978, the Assembly, inter alia:

(a) Reiterated that "South Africa's illegal occupation of Namibia constitutes a continued act of aggression against the Namibian people and against the United Nations";

(b) Stated that the "aggressive policies of the South African occupation regime in Namibia are further reflected in its repeated acts of aggression against, military incursions into, and violations of the territorial integrity of the neighbouring States, in particular Angola and Zambia, causing considerable loss of life and damage to property".[476]

417. The General Assembly later declared that South Africa's illegal occupation of Namibia constituted an act of aggression in terms of the Definition of Aggression. In a number of resolutions, the General Assembly, inter alia:

(a) Strongly reiterated that South Africa's continuing illegal and colonial occupation of Namibia, in defiance of repeated General Assembly and Security Council resolutions, constituted an act of aggression against the Namibian people and a challenge to the authority of the United Nations, which had direct responsibility for Namibia until independence;

(b) Declared that South Africa's illegal occupation of Namibia constituted an act of aggression against the Namibian people in terms of the Definition of Aggression;

(c) Strongly condemned South Africa for its military build-up in Namibia, its introduction of compulsory military service for Namibians, its proclamation of a so-called security zone in Namibia, its recruitment and training of Namibians for tribal armies and the use of mercenaries to suppress the Namibian people and to carry out its policy of military attacks against independent African States, and its threats and acts of subversion and aggression against those States;

(d) Strongly condemned South Africa for its use of the illegally occupied international Territory of Namibia as a staging ground for launching continuing armed attacks or a springboard for perpetrating armed invasions, subversion, destabilization and aggression against independent African States, which had caused extensive loss of human life and destruction of economic infrastructures;

(e) Specifically denounced South Africa for its acts of aggression against Angola, Botswana, Mozambique, Zambia and Zimbabwe;

(f) Strongly condemned South Africa for its persistent and repeated unprovoked acts of aggression against and invasion of Angola, including the continued occupation of part of its territory in gross violation of its sovereignty and territorial integrity.[477]

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[475] General Assembly resolution 498 (V) was adopted by 44 to 7, with 9 abstentions. See also General Assembly resolutions 500 (V) of 18 May 1951, 712 (VII) of 28 August 1953 and 2132 (XX) of 21 December 1965 on the Korean question, in which the reference to "aggression" was repeated.

[476] General Assembly resolution S-9/2 was adopted by 119 to none, with 2 abstentions. See also resolution 36/121 A, adopted by 120 votes to none, with 27 abstentions, on 10 December 1981.

(c) South Africa

418. From the 1960s through the 1980s, the General Assembly adopted several resolutions condemning South Africa for its repeated acts of aggression against other African States.[478] The Assembly in 1962 warned South Africa that any attempt "to annex or encroach upon the territorial integrity of [Basutoland, Bechuanaland and Swaziland] shall be considered an act of aggression".[479] It also, inter alia, condemned South Africa for:

(a) Its 1969 armed intervention in Southern Rhodesia as constituting an act of aggression;[480]

(b) Its continuing acts of aggression, particularly its raid on Matola, Mozambique, in January 1981, its large-scale invasion of Angola since July 1981 and its invasion of Seychelles in November 1981;[481]

(c) Its acts of military aggression against Angola, Botswana, Lesotho, Mozambique, Seychelles, Swaziland, Zambia and Zimbabwe as well as its activities to recruit, train, finance and arm mercenaries for aggression against neighbouring States;[482]

(d) Its continued occupation of parts of the territory of Angola, its acts of armed aggression against Lesotho as well as its acts of aggression against Mozambique;[483]

(e) Its overt and covert aggressive actions directed at destabilizing neighbouring States and those aimed against refugees from South Africa and Namibia.[484]

419. The General Assembly also demanded that South Africa should pay "full compensation" for its act of aggression to Angola, Lesotho and other independent African States.[485]

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[477] See General Assembly resolution 36/121 A, adopted by 120 votes to none, with 27 abstentions, on 10 December 1981; resolution 37/233 A, adopted by 120 votes to none, with 23 abstentions, on 20 December 1982; resolution 38/36 A, adopted by 117 votes to none, with 28 abstentions, on 1 December 1983; resolution 39/50 A, adopted by 128 votes to none, with 25 abstentions, on 12 December 1984; resolution 40/97 A, adopted by 131 votes to none, with 23 abstentions, on 13 December 1985; resolution S-14/1, adopted without a vote on 20 September 1986; resolution 41/39 A, adopted by 130 votes to none, with 26 abstentions, on 20 November 1986; resolution 42/14 A, adopted by 131 votes to none, with 24 abstentions, on 6 November 1987; and resolution 43/26 A, adopted by 130 votes to none, with 23 abstentions, on 17 November 1988.

[478] See General Assembly resolution 36/172 A, adopted by 115 votes to 12, with 16 abstentions, on 17 December 1981 (vehemently condemning South Africa for repeated acts of aggression against independent African States designed to destabilize southern Africa); resolution 36/8 adopted by 121 to 19, with 6 abstentions, on 28 October 1981 (vigorously condemning the repeated acts of aggression committed by South Africa against neighbouring States, particularly Angola, Botswana, Mozambique and Zambia); resolution 38/39 A, adopted by 124 to 16, with 10 abstentions, on 5 December 1983 (strongly condemning South Africa for repeated acts of aggression against independent African States); and resolution 39/72 A, adopted by 123 votes to 15, with 15 abstentions, on 13 December 1984 (strongly condemning the repeated acts of aggression committed by South Africa against independent African States and declaring that South Africa was guilty of acts of aggression).

[479] General Assembly resolution 1954 (XVIII), adopted on 11 December 1963 by a vote of 78 to 3, with 16 abstentions. See also General Assembly resolution 1817 (XVII), adopted on 18 December 1962, dealing with the same issue.

[480] General Assembly resolution 2508 (XXIV), adopted on 21 November 1969 by a vote of 83 to 7, with 20 abstentions.

[481] General Assembly resolution 36/172 C, adopted by 136 votes to 1, with 8 abstentions, on 17 December 1981 (also condemning South Africa for its unprovoked acts of aggression against Angola, Seychelles and other independent African States).

[482] General Assembly resolution 38/14, adopted without a vote on 22 November 1983, annex.

[483] General Assembly resolution 38/39 C, adopted by 146 votes to 2, with 4 abstentions, on 5 December 1983.

[484] General Assembly resolution 39/72 G, adopted by 146 votes to 2, with 6 abstentions, on 13 December 1984.

[485] See para. 4 of General Assembly resolution 36/172 C, para. 6 of General Assembly resolution 38/39 C and para. 8 of General Assembly resolution 39/72 A.

420. The General Assembly furthermore noted in various resolutions that the Security Council had failed to exercise its responsibility with respect to Southern Africa.[486]

(d) Territories under Portuguese administration

421. In the 1970s, the General Assembly adopted a number of resolutions with regard to the question of Territories under Portuguese administration and, inter alia, strongly condemned the policies of Portugal in perpetuating its illegal occupation of certain sectors of the Republic of Guinea-Bissau and the repeated acts of aggression committed by its armed forces against the people of Guinea-Bissau and Cape Verde.[487]

(e) The Middle East

422. In 1947, the General Assembly adopted resolution 181 (II) on the future government of Palestine, in which it requested the Security Council to take certain measures, including determining, "as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution".[488] In the second preambular paragraph of its resolution 3414 (XXX) of 1975, the Assembly indicated that it was guided by the purposes and principles of the Charter which considered "any military occupation, however temporary, or any forcible annexation of such territory, or part thereof, as an act of aggression".[489]

423. In its resolution 36/27, adopted on 13 November 1981, the General Assembly considered the Israeli attack against the Iraqi nuclear installations and, inter alia:

(a) Expressed "its deep alarm over the unprecedented Israeli act of aggression against the Iraqi nuclear installations on 7 June 1981, which created a grave threat to international peace and security";

(b) Expressed its grave concern "over the misuse by Israel, in committing its acts of aggression against Arab countries, of aircraft and weapons supplied by the United States";

(c) Condemned "the Israeli threats to repeat such attacks on nuclear installations if and when it deems it necessary";

(d) Strongly condemned "Israel for its premeditated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct, which constitutes a new and dangerous escalation in the threat to international peace and security";

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[486] The General Assembly condemned France, the United Kingdom and the United States for their vetoes in the Security Council, where the majority favoured adopting measures to isolate South Africa in order to compel it to vacate Namibia. See General Assembly resolution 36/121 A, adopted by 120 votes to none, with 27 abstentions, on 10 December 1981. The Assembly also noted with regret and concern that the Council failed to exercise its primary responsibility for the maintenance of international peace and security when a number of Western permanent members had vetoed the draft resolutions proposing comprehensive mandatory sanctions against South Africa under Chapter VII of the Charter. See General Assembly resolution ES-8/2, adopted by 117 votes to none, with 25 abstentions, on 14 September 1981. See also, for example, resolution 36/172 A, adopted by 115 votes to 12, with 16 abstentions, on 17 December 1981; resolution 37/233 A, adopted by 120 votes to none, with 23 abstentions, on 20 December 1982; resolution 38/36 A, adopted by 117 votes to none, with 28 abstentions, on 1 December 1983; resolution 38/39 D, adopted by 122 votes to 10, with 18 abstentions, on 5 December 1983; resolution 39/50 A, adopted by 128 votes to none, with 25 abstentions, on 12 December 1984; resolution 39/72 A, adopted by 123 votes to 15, with 15 abstentions, on 13 December 1984; resolution 40/97 A, adopted by 131 votes to none, with 23 abstentions, on 13 December 1985; resolution S-14/1, adopted without a vote on 20 September 1986; resolution 41/39 A, adopted by 130 votes to none, with 26 abstentions, on 20 November 1986; resolution 42/14 A, adopted by 131 votes to none, with 24 abstentions, on 6 November 1987; and resolution 43/26 A, adopted by 130 votes to none, with 23 abstentions, on 17 November 1988. See further General Assembly resolution ES-8/2, adopted by 117 votes to none, with 25 abstentions, on 14 September 1981. See also, for example, resolution 36/121 A, adopted by 120 votes to none, with 27 abstentions, on 10 December 1981; resolution 37/233 A, adopted by 120 votes to none, with 23 abstentions, on 20 December 1982; resolution 38/36 A, adopted by 117 votes to none, with 28 abstentions, on 1 December 1983; and resolution 39/50 A, adopted by 128 votes to none, with 25 abstentions, on 12 December 1984.

[487] See General Assembly resolutions 2795 (XXVI), adopted on 10 December 1971, 3061 (XXVIII), adopted on 2 November 1973 and 3113 (XXVIII), adopted on 12 December 1973 by 105 votes to 8, with 5 abstentions; 93 votes to 7, with 30 abstentions and 105 votes to 8, with 16 abstentions respectively.

[488] General Assembly resolution 181 (II), adopted on 29 November 1947 by 33 votes to 13, with 10 abstentions.

[489] General Assembly resolution 3414 (XXX), adopted on 5 December 1975 by 84 votes to 17, with 27 abstentions.

(e) Issued "a solemn warning to Israel to cease its threats and the commission of such armed attacks against nuclear facilities".[490]

424. In paragraph 6 of the same resolution, the General Assembly demanded that Israel, "in view of its international responsibility for its act of aggression, pay prompt and adequate compensation for the material damage and loss of life suffered as a result of that act".

425. In its resolution 37/18, adopted on 16 November 1982, the General Assembly further considered the attack on the Iraqi nuclear installations and, inter alia:

(a) Expressed grave alarm at the dangerous escalation of Israel's acts of aggression in the region;

(b) Expressed grave concern about Israel's continuing threats to repeat such attacks against nuclear installations;

(c) Strongly condemned "Israel for the escalation of acts of aggression in the region";

(d) Condemned "Israel's threats to repeat such attacks, which would gravely endanger international peace and security";

(e) Demanded "that Israel withdraw forthwith its officially declared threat to repeat its armed attack against nuclear facilities";

(f) Considered "the Israeli act of aggression to be a violation and a denial of the inalienable sovereign right of States to scientific and technological progress" as well as the "inalienable human rights and the sovereign right of States to scientific and technological development".[491]

426. In 1981 and 1982, with regard to the situation in Lebanon, the General Assembly, inter alia:

(a) Strongly condemned "the Israeli aggression against Lebanon and the continuous bombardment and destruction of its cities and villages, and all acts that constitute a violation of its sovereignty, independence and territorial integrity and the security of its people";[492]

(b) Expressed its deep shock and alarm at the "deplorable consequences of the Israeli invasion of Beirut on 3 August 1982";

(c) Strongly condemned the Israeli aggression against Lebanon in June 1982.[493]

427. In a series of resolutions with regard to the situation of Palestinian people, adopted from 1981 to 1990, the General Assembly, inter alia, condemned:

> "Israel's aggression and practices against the Palestinian people in the occupied Palestinian territories and outside these territories, particularly in the Palestinian refugee camps in Lebanon, including the expropriation and annexation of territory, the establishment of settlements, assassination attempts and other terrorist, aggressive and repressive measures, which are in violation of the Charter and the principles of international law and the pertinent international conventions".[494]

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[490] General Assembly resolution 36/27 was adopted by 109 votes to 2, with 34 abstentions.

[491] General Assembly resolution 37/18 was adopted by 119 votes to 2, with 13 abstentions.

[492] General Assembly resolution 36/226 A, adopted by 94 votes to 16, with 28 abstentions, on 17 December 1981.

[493] General Assembly resolution 37/3, adopted by 120 votes to 17, with 6 abstentions, on 3 December 1982.

[494] General Assembly resolution 36/226 A, adopted by 94 votes to 16, with 28 abstentions, on 17 December 1981. See also resolution 37/123 F, adopted by 113 votes to 17, with 15 abstentions, on 20 December 1982; resolution 38/180 D, adopted by 101 votes to 18, with 20 abstentions, on 19 December 1983; resolution 39/146 A, adopted by 100 votes to 16, with 28 abstentions, on 14 December 1984; resolution 40/168 A, adopted by 98 votes to 19, with 31 abstentions, on 16 December 1985; resolution 41/162 A, adopted by 104 votes to 19, with 32 abstentions, on 4 December 1986; resolution 42/209 B, adopted by 99 votes to 19, with 33 abstentions, on 11 December 1987; resolution 43/54 A, adopted by 103 votes to 18, with 30 abstentions, on 6 December 1988; resolution 44/40 A, adopted by 109 votes to 18, with 31 abstentions, on 4 December 1989; resolution 45/83 A, adopted by 99 votes to 19, with 32 abstentions, on 13 December 1990; and resolution 46/82 A, adopted by 93 votes to 27, with 37 abstentions, on 16 December 1991. The resolutions adopted at the thirty-seventh to thirty-ninth sessions referred particularly to Palestinians in Lebanon; subsequent resolutions contained no such reference. The resolutions adopted from the thirty-eighth to forty-sixth sessions refer to Israel's "aggression, policies and practices".

428. In 1982, the Security Council, taking into account its inability to exercise its primary responsibility for the maintenance of international peace and security because of the lack of unanimity of its permanent members, decided to call an emergency special session of the General Assembly to consider Israel's actions with respect to the Golan Heights.[495] At its ninth emergency special session and subsequent sessions held from 1982 to 1990, the General Assembly considered Israel's occupation of the Golan Heights and, inter alia:

(a) Recalled article 3, subparagraph (a), and article 5, paragraph 1, of the Definition of Aggression;

(b) Declared that Israel's continued occupation of the Golan Heights and its decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Syrian Golan Heights constituted an act of aggression under Article 39 of the Charter of the United Nations and the Definition of Aggression.[496]

(f) Bosnia and Herzegovina

429. In its resolutions 46/242 of 25 August 1992 and 47/121 of 18 December 1992, the General Assembly considered the situation in Bosnia and Herzegovina and deplored the aggression against its territory. The Assembly, inter alia:

(a) Deplored "the grave situation in Bosnia and Herzegovina and the serious deterioration of the living conditions of the people there, especially the Muslim and Croat populations, arising from the aggression against the territory of the Republic of Bosnia and Herzegovina, which constitutes a threat to international peace and security";

(b) Demanded that all forms of outside interference cease immediately and that the Yugoslav People's Army units and the Croatian Army be withdrawn, subjected to the authority of the Government of Bosnia and Herzegovina or disbanded and disarmed with their weapons placed under effective international monitoring;

(c) Condemned the violation of the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina;

(d) Demanded that Serbia and Montenegro and Serbian forces in Bosnia and Herzegovina immediately cease their aggressive acts and hostility and comply fully and unconditionally with the relevant resolutions of the Security Council.[497]

C. The International Court of Justice

430. The International Court of Justice is the principal judicial organ of the United Nations, according to Article 92 of the Charter. The Court is authorized to issue advisory opinions on legal questions in response to requests from the General Assembly, the Security Council or other organs of the United Nations and specialized agencies that may be authorized by the General Assembly to make such a request with respect to legal questions arising within the scope of their activities pursuant to Article 96 of the Charter. The Court may also decide legal disputes between States in cases referred to the Court in accordance with Article 36 of the Statute of the Court.

431. The Court has considered issues relating to aggression in three contexts: first, in relation to the

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[495] Security Council resolution 500, adopted by 13 votes to none, with 2 abstentions (United Kingdom and United States), on 28 January 1982.

[496] General Assembly resolution ES-9/1, adopted by 86 votes to 21, with 34 abstentions, on 5 February 1982. See also resolution 37/123 A, adopted by 67 votes to 22, with 31 abstentions, on 16 December 1982; resolution 38/180 A, adopted by 84 votes to 24, with 31 abstentions, on 19 December 1983; resolution 39/146 B, adopted by 88 votes to 22, with 32 abstentions, on 14 December 1984; resolution 40/168 B, adopted by 86 votes to 23, with 37 abstentions, on 16 December 1985; resolution 41/162 B, adopted by 90 votes to 29, with 34 abstentions, on 4 December 1986; resolution 42/209 C, adopted by 82 votes to 23, with 43 abstentions, on 11 December 1987; resolution 43/54 B, adopted by 83 votes to 21, with 45 abstentions, on 6 December 1988; resolution 44/40 B, adopted by 84 votes to 22, with 49 abstentions, on 4 December 1989; and resolution 45/83 B, adopted by 84 votes to 23, with 41 abstentions, on 13 December 1990. In the resolutions adopted from the thirty-eighth to the forty-fifth sessions, the Assembly declared that Israel's continued occupation of the Golan Heights (as well as its decision of 14 December 1981) constituted an act of aggression under Article 39 of the Charter and the Definition of Aggression. Resolutions adopted from the forty-second to the forty-fifth session referred to the Syrian Arab Golan.

[497] General Assembly resolution 46/242 was adopted by 136 votes to 1, with 5 abstentions. General Assembly resolution 47/121 was adopted by 102 votes to none, with 57 abstentions. See also General Assembly resolutions 48/88 of 20 December 1993 and 49/10 of 3 November 1994, in which reference was made to "the continuation of aggression in Bosnia and Herzegovina".

functions of the principal organs of the United Nations; second, in relation to requests for provisional measures to prevent alleged acts of aggression from exacerbating the situation giving rise to the legal dispute referred to the Court; and third, in relation to a legal dispute involving an alleged unlawful use of force or act of aggression committed by a State which is the subject of a case referred to the Court.

1. The functions of the principal organs of the United Nations with respect to aggression

(a) Advisory opinion[498]

Certain expenses of the United Nations

432. With regard to *Certain Expenses of the United Nations*,[499] in an advisory opinion, the International Court of Justice (ICJ) considered the respective functions of the General Assembly and the Security Council under the Charter, particularly with respect to the maintenance of international peace and security. The Court stated that the responsibility conferred on the Security Council by Article 24 of the Charter is "primary not exclusive".[500] The Court further stated that:

> "This primary responsibility is conferred upon the Security Council, which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.
>
> "The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.'

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[498] In accordance with article 65 of its Statute, the International Court of Justice "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court is not obliged to give an advisory opinion. The Permanent Court of International Justice (PCIJ) declined a request for an advisory opinion from the Council of the League of Nations. Following the dispute between Finland and Russia with regard to Eastern Carelia, the Council of the League of Nations adopted a resolution on 21 April 1923 requesting PCIJ for an advisory opinion concerning articles 10 and 11 of the Treaty of Peace between Finland and Russia. Russia was not a member of the League. In declining to give an advisory opinion, PCIJ relied on: the necessity of the consent of States to submit their dispute to any pacific settlement; the fact that Russia was not a member of the League and that it had already objected to the Court dealing with an advisory opinion; and that the question before the Court required enquiry as to facts which could not be left to the Court itself:

> "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement ... Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland ... The Court therefore finds it impossible to give its opinion on a dispute of this kind.
>
> "It appears to the Court that there are other cogent reasons which render it very inexpedient that the Court should attempt to deal with the present question. The question whether Finland and Russia contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia is really one of fact. To answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward on this subject by Finland and Russia respectively, and of securing the attendance of such witnesses as might be necessary. The Court would, of course, be at a very great disadvantage in such an enquiry, owing to the fact that Russia refuses to take part in it. It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact: What did the parties agree to? The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are."

See *Collection of Advisory Opinions*, Series B. No. 5 (1923), pp. 27-28.

[499] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151.

[500] Ibid., p. 163.

> The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations, they are not merely hortatory. Article 18 deals with '*decisions*' of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, 'and budgetary questions'."[501]

433. The Court further stated that:

> "The provisions of the Charter which distribute functions and powers to the Security Council and the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.
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> "The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to 'action' in the last sentence of Article 11, paragraph 2 ...
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> "The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when 'action' is necessary the General Assembly shall refer the question to the Security Council. The word 'action' must mean such action as is solely within the province of the Security Council. ... The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'."[502]

(b) Contentious cases

434. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court considered its functions in relation to those of the Security Council. The Court noted that there was no doubt that the Security Council was "actively seized of the matter", as it had indicated by its resolution 457 (1979), and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter. The Council, when it met again on 31 December 1979 and adopted resolution 461 (1979), took note in its preamble of the Court's Order of 15 December 1979 indicating provisional measures; and "it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council".[503] The Court indicated that there was nothing irregular in the simultaneous exercise of the respective functions of the Court and the Council with respect to the same matter. The Court observed:

> "Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive,

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[501] Ibid.

[502] Ibid., pp. 164-165.

[503] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 21.

> factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 2 ..."[504]

435. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court did not share the argument by the United States that Nicaragua had invoked a charge of aggression and armed conflict envisaged in Article 39 of the Charter of the United Nations, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter and not in accordance with the provisions of Chapter VI.[505] The Court noted that while the matter was discussed in the Security Council, no notification had been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized.[506]

436. The Court also referred to the *United States Diplomatic and Consular Staff in Tehran* case in expressing "the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*."[507] The Court emphasized the *primary* responsibility of the Security Council for the maintenance of international peace and security under Article 24 of the Charter, the absence of any demarcation of functions between the Court and the Council in this area and the fundamental difference in the nature of those functions:

> "The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events."[508]

437. The Court rejected the argument by the United States that Nicaragua's complaint about the threat or use of force contrary to Article 2, paragraph 4, of the Charter invoked a charge of aggression and armed conflict envisaged in Article 39 of the Charter which could only be dealt with by the Council under Chapter VII of the Charter:

> "This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between Member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement."[509]

438. The Court noted that it "has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force" and referred to the *Corfu Channel* case in that regard.[510]

439. The Court rejected the argument that the proceedings were "objectionable as being in effect an

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[504] Ibid., p. 22.

[505] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 434.

[506] Ibid.

[507] Ibid., p. 433.

[508] Ibid., pp. 434-435. The Court referred to this passage in the subsequent cases discussed below.

[509] Ibid., p. 434. The Court also noted that "in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the cases." Ibid., p. 435.

[510] Ibid., p. 435.

appeal to the Court from an adverse decision of the Security Council" for the following reasons:

> "The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgement on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations."[511]

440. The Court also rejected the argument that the case was inadmissible because of "the inability of the judicial function to deal with situations involving ongoing conflict", for the following reasons:

> "A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowances for this (*Corfu Channel, I.C.J. Reports 1949*, p. 18; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof."[512]

441. In the *Application of the Genocide Convention* case, the Court referred to the *Nicaragua* case in rejecting Yugoslavia's argument that it would be premature and inappropriate for the Court to indicate provisional measures because the Security Council had adopted numerous resolutions concerning the situation in the former Yugoslavia on the basis of Article 25 and expressly acting under Chapter VII of the Charter.[513]

442. In the *Armed Activities in the Congo* case, the Court again referred to the *Nicaragua* case in rejecting Uganda's argument that the Democratic Republic of the Congo's request for provisional measures was inadmissible because it concerned essentially the same issues as a Security Council resolution and was, moreover, moot because Uganda had fully accepted and was complying with that resolution. The Court held that the Security Council resolution and the measures taken in its implementation did not preclude the Court from acting in accordance with its Statute and Rules.[514]

443. In the *Lockerbie* case, however, the Court did not grant the Libyan Arab Jamahiriya's request for provisional measures to protect its right to try the alleged terrorists in its national courts under the Montreal Convention because the Security Council had adopted a resolution, acting under Chapter VII of the Charter, in which it called upon all States to comply with its provisions, including Libya, responding to requests from the United Kingdom and the United States to surrender for trial the alleged offenders, notwithstanding the existence of any rights or obligations under any international agreement. The Court noted that the parties' obligations as Members of the United Nations to accept and carry out Security Council decisions in accordance with Article 25 of the Charter prevailed over their obligations under any other international agreement, including the Montreal Convention, according to Article 103 of the Charter. The Court held that it would not be appropriate to protect by provisional measures the rights claimed by Libya under the Montreal Convention as a result of the Security Council resolution.[515]

2. Provisional measures

444. In the *Military and Paramilitary Activities in Nicaragua* case, Nicaragua claimed, inter alia, that the United States was using force and the threat of force against Nicaragua contrary to general and customary international law; and "recruiting, training, arming, equipping, financing, supplying and otherwise

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[511] Ibid., p. 436.

[512] Ibid., p. 437.

[513] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, pp. 18-19.

[514] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Request for the Indication of Provisional Measures, Order of 1 July 2000*, para. 36. In its application instituting proceedings before the Court, the Congo recalled its efforts to bring the matter to the attention of the Security Council and described the resolution eventually adopted by the Council as "a dead letter". *Application instituting Proceedings filed with the Registry of the Court on 23 June 1999.*

[515] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15.

encouraging, supporting, aiding and directing military and paramilitary actions in and against Nicaragua" contrary to Article 2, paragraph 4, of the Charter. The Court, inter alia, ordered provisional measures indicating that the United States should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, particularly laying mines; and that Nicaragua's right to sovereignty and political independence should not be jeopardized by any military and paramilitary activities prohibited by international law, particularly "the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State".[516]

445. In the *Case concerning the Frontier Dispute (Burkina Faso/Mali)*, the Chamber of the Court formed to deal with a dispute concerning the delimitation of the common frontier of Burkina Faso and Mali was requested by both parties to order provisional measures to address their respective claims of armed attack and occupation by armed forces. The Chamber noted that the armed actions had taken place within or near the disputed area; that the resort to force was irreconcilable with the principle of the peaceful settlement of international disputes; and that the armed actions within the disputed territory could destroy relevant evidence. The Chamber, inter alia, ordered both parties to ensure that no action was taken that might aggravate or extend the border dispute or prejudice the right of the other party to compliance with the eventual judgment; to refrain from any act likely to impede the gathering of evidence material to the case; to withdraw their armed forces; and to observe the ceasefire.[517]

446. In the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, Cameroon filed an application with the Court requesting the determination of its boundary with Nigeria and alleging that the latter had contested the boundary in the form of aggression by its troops which had occupied Cameroonian territory. Cameroon subsequently requested the Court to order provisional measures to address new armed attacks by Nigerian forces in the disputed territory. The Court noted that the armed actions within the disputed territory could jeopardize relevant evidence and aggravate or extend the dispute. The Court also noted the letters from the President of the Security Council addressed to the parties calling upon them to respect the ceasefire agreement and to return their forces to their positions before the dispute was submitted to the Court. The Court, inter alia, ordered the parties to ensure that no action was taken, particularly by their armed forces, which might prejudice the rights of the other party with respect to the eventual judgment or aggravate or extend the dispute; to observe the cease-fire agreement; to ensure that the presence of their armed forces did not extend beyond their positions before the latest armed actions; and to take all necessary steps to conserve relevant evidence within the disputed area.[518]

447. In the *Armed Activities in the Congo* case, the Democratic Republic of the Congo alleged that Uganda had, inter alia, perpetrated acts of armed aggression on the territory of the Democratic Republic of the Congo contrary to article 1 of the Definition of Aggression and Article 2, paragraph 4, of the Charter. The Democratic Republic of the Congo subsequently requested the Court to order provisional measures to address the resumption of fighting between the armed troops of Uganda and another foreign army which had caused substantial damage to the Democratic Republic of the Congo and its population. The Court noted that it was not disputed that Ugandan forces were on the territory of the Democratic Republic of the Congo and that fighting had taken place there between those forces and the armed forces of a neighbouring State. The Court also noted that the Security Council had adopted a resolution, acting under Chapter VII, in which, inter alia, it called upon all parties to cease hostilities in the Democratic Republic of the Congo and comply with the ceasefire agreement; demanded that Ugandan and Rwandan forces desist from further fighting; demanded that Uganda and Rwanda withdraw their forces from the Democratic Republic of the Congo; and demanded that all parties abstain from offensive action during the disengagement and withdrawal of foreign forces. The Court adopted provisional measures requiring the parties to prevent and refrain from any action, particularly armed action, which might prejudice the other party's rights with respect to the eventual judgment, aggravate or extend the dispute or make it more difficult to resolve; and to take all measures necessary to comply with their obligations under

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[516] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 187.

[517] *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3.

[518] *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13.

international law, including the Charter of the United Nations and the Security Council resolution.[519]

3. Legal disputes concerning the use of force or aggression

448. In the *Military and Paramilitary Activities in and against Nicaragua* case, Nicaragua alleged, inter alia, that the United States had violated the prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter and had breached its obligation under general and customary international law by violating the sovereignty of Nicaragua through armed attacks carried out by air, land and sea. The United States did not participate in the proceedings on the merits because in its view the Court did not have jurisdiction over the case. Nonetheless the Court considered the arguments advanced by the United States to justify its action, which required a determination of the content of the right of self-defence. Even though Nicaragua did not allege that the United States had committed aggression, the Court considered certain aspects of the Definition of Aggression in determining the more serious violations of the prohibition of the use of force which constituted an armed attack for purposes of the right of self-defence. The Court stated that as regards certain particular aspects of the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter, it would be necessary to distinguish the most grave forms of the use of force, "those constituting an armed attack", from other less grave forms.[520] In determining the legal rules which applied to the less grave forms of the use of force, the Court drew on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (General Assembly resolution 2625 (XXV)), whereby, in its view, States by adopting it afforded "an indication of their *opinio juris* as to customary international law on the question".[521] The Court further stated that "[a]longside certain descriptions [in the Friendly Relations Declaration] which may be referred to aggression, this text includes others which refer only to less grave forms of the use of force".[522]

449. Referring to the Definition of Aggression, the Court concluded that an armed attack included not only action by regular armed forces across an international border, but also the sending by a State of armed bands which carry out acts of armed force against another State of such gravity as to amount to an actual attack conducted by regular forces. The Court indicated that the description of such action contained in article 3, paragraph (g), of the Definition of Aggression "may be taken to reflect customary international law".[523] The Court also made the following observation:

> "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support."[524]

450. In the *Armed Activities on the Territory of the Congo* case, the Democratic Republic of the Congo alleged that Uganda had perpetrated acts of armed aggression on its territory within the meaning of article 1 of the Definition of Aggression and contrary to Article 2, paragraph 4, of the Charter. The Democratic Republic of the Congo asserted that Ugandan armed forces had conducted a surprise invasion, committed armed attacks and occupied the territory of the Congo. The Congo included an illustrative list of incidents to provide "evidence of a deliberate policy operated by the Ugandan Government against the Democratic Republic of the Congo" and "to demonstrate, moreover, the extent of the responsibility incurred by the leaders of the countries perpetrating the aggression". The Congo considered the armed aggression by Uganda to be "an established reality, since the Ugandan Government, having long denied the presence of its forces, is now imposing conditions for their withdrawal". The Congo also asserted that "[t]his aggression was in reality the result of a clearly established common intent, formed in

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[519] *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000.*

[520] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 101.

[521] Ibid.

[522] Ibid.

[523] Ibid., p. 103.

[524] Ibid., p. 104.

close collaboration with foreign powers, who provided the necessary financial backing and a large degree of logistic support". Uganda challenged the allegations of the Democratic Republic of the Congo. The Court has not yet decided the merits of the case.[525]

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[525] *Application instituting Proceedings, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 23 June 1999.* The Democratic Republic of the Congo also instituted proceedings before the Court against Burundi and Rwanda for alleged acts of armed aggression perpetrated by those countries on its territory within the meaning of article 1 of the Definition of Aggression and contrary to Article 2, paragraph 4, of the Charter. However, both of these proceedings were subsequently discontinued at the request of Congo and concurrence of Burundi and Rwanda.